85-1895

No. 85-____

Supreme Court, U.S.
FILED
MAY 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

R. ALLEN CHILDRESS,
PETITIONER,

v.

THOMAS S., appt'd guardian
ad litem, JOYCE BROOKS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT H. GAGE
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MORGANTON, NORTH CAROLINA 28655
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ATTORNEYS FOR PETITIONER

47pp

Question Presented for Review

Can the state court-appointed guardian of an individual be held responsible as a state actor by virtue of that appointment, under Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), for alleged state action in failure to accord his ward certain care and treatment, where the guardian has consistently acted independently of state control, is obliged by state law to exercise impartial judgment on his ward's behalf, and has no authority to order any such care and treatment nor any independent resources from which to provide the same?

PARTIES

Parties in the Circuit Court of Appeals were:

Thomas S., by his appointed guardian ad litem, Joyce Brooks; and

Philip J. Kirk, Jr. [previously Sarah T. Morrow], Secretary, North Carolina Department of Human Resources; and

Allen Childress, guardian for plaintiff.

Philip J. Kirk, Jr. has filed a Petition for Writ of Certiorari, Case. No. 85-1590, in this Court.

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District Court:

Opinion and Order-601 F.Supp. 1055

JURISDICTION

The opinion and judgment of the court of appeals was entered on January 9, 1986.

Petitioner Kirk's Petition for Rehearing was denied by Order of February 19, 1986.

The Court has jurisdiction under 28 U.S.C. Section 1254(1) to review the circuit court's judgment.

CONSTITUTIONAL PROVISIONS AND STATUTES:

The Fourteenth Amendment, U.S. Constitution, provides in part:

> Section 1--All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

> States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Citation is made to sections of Chapter 35, Article 1A, North Carolina General Statutes, "Guardianship of Incompetent Adults". Sections 35-1.7 through -1.35 have already been reproduced and filed in this matter at A-1 through A-15 of App. A to Respondent's Brief in Opposition dated April 26, 1986. Sections 35-1.37 and 1.38 are reproduced in App. D. to this petition, infra., at 45.

STATEMENT OF THE CASE

Respondent Thomas S. was born on May 31, 1963 and remained in the custody of the Gaston County, N. C. Department of Social Services until his eighteenth birthday. App. C, Respondent's Brief, 57, 58. On June 4, 1981 that Department filed a petition with the Gaston County Clerk of Superior Court asking that Thomas be declared an incompetent adult. App. C, Respondent's Brief, 37.

On January 28, 1982 an order was signed adjudicating Thomas incompetent. App., infra, 41. Mr. R. J. Blackley, a state employee and a resident of Wake County was appointed guardian for Thomas after the Clerk found "[t]hat there is no individual willing to serve as guardian..." and concluded that "the appointment as guardian of a disinterested public agent as

defined by General Statute 35-1.7(4) is necessary." App., infra, at 45.

On February 22, 1982 your Petitioner Allen Childress was substituted as guardian by the Burke County Clerk of Superior Court because his personal home residence in Burke County was close to that of Tom. App. D, Respondent's Brief, at 280.

Childress is a state employee. His job with the state is that of Regional Specialist for Adult Mental Health, App. D, Respondent's Brief, at 279. There is no contention that it is or ever has been Mr. Childress' responsibility as a state employee to exercise any responsibility to Tom. His only responsibility to Tom is as guardian under his appointment, and he was sued only in his capacity as Thomas' guardian. App. C, Respondent's Brief, at 33-34.

The statutory procedure under which Mr. Childress was appointed is the same as

that applicable to the appointment of any guardian regardless of the guardian's vocation or employment. N.C.G.S. Sections 35-1.6 through 1.38. App. A., Respondent's Brief, A-1 through A-15.

Mr. Childress was appointed as a "disinterested public agent" rather than as an individual or a corporation, N.C.G.S. Sections 35-1.28 and 1.29. App. A, Respondent's Brief, A-12 and -13. There is no distinction of the duties and responsibilities of one sort of guardian from those of any other. See N.C.G.S. Sections 35-1.34 and 1.35. App. A, Respondent's Brief, A-14 and -15.

A "disinterested public official" may by definition have no immediate responsibilities for providing services to his ward. N.C.G.S. Section 35-1.7(4). App. A, Respondent's Brief, at A-3.

No resources are made available to the guardian as guardian for the care, comfort,

and maintenance or for the training, education, employment and rehabilitation or habilitation of Thomas. The only resources which are available to this guardian are those available generally to any guardian, public or private, to a parent, or to anyone else. App. D, Respondent's Brief, at 282-3.

N.C.G.S. Section 35-1.34(b) provides that "a guardian of the person is entitled to be reimbursed out of the ward's estate for expenditures incurred in the performance of his duties." No provision is made for the case in which the ward has no "estate." App. A, Respondent's Brief, at A-15.

The guardian has no authority to order that anyone be treated or cared for at a state institution, at an area program, at a Department of Social Services, or at any other program or institution. App. D., Respondent's Brief, at 282.

The statutory guardianship scheme provides that a guardian shall be accountable to the Clerk of Superior Court, N.C.G.S. Section 35-1.37 and 1.38 or to a "designated agency, if an agency has been appointed", N.C.G.S. Sections 35-1.31(a) and 1.32. App. A, Respondent's Brief, at A-13 and -14. The Clerk of Superior Court is a judicial officer, not a state agent. N.C.G.S. Section 7A-103. There has been no "designated agency" appointed in Thomas' case with the continuing responsibility to receive reports from the guardian. App. D, Respondent's Brief, at 280-81 and 289.

A guardian appointed under Article 1A, Chapter 35, as was petitioner Childress, is charged by statute with the task of exercising his or her ward's rights on behalf of that ward, in a responsible, impartial manner. N.C.G.S. Section 35-1.6, App. A, Respondent's Brief, at A-2.

There is no allegation and no evidence

indicating that the guardian has not discharged his state guardianship duties to his ward Thomas. The Court of Appeals properly found that: "Indeed, throughout the litigation the guardian has tried to secure for Thomas the treatment recommended by the professionals." App., Kirk Petition, at A-21.

Respondent alleged in the district court that jurisdiction is conferred on the federal courts by 28 USC Sections 1331 and 1343 and that the action is authorized by 42 USC Section 1983.

REASONS FOR GRANTING WRIT OF CERTIORARI

The court of appeals relied upon Lugar v. Edmondson Oil Co., 457 US 922 (1982), in finding that the guardian Allen Childress had acted under color of state law in arranging for care and services to be furnished to his ward, Thomas, on the ground that state guardianship law

authorizes or creates the right or privilege of a guardian to make such arrangements. The court held further that Childress "is properly characterized as a state actor because 'he has acted together with or has obtained significant aid from state officials....'" (citing Lugar, 547 US at 937.) App., Kirk Petition, at A-22.

We say that the court was mistaken in applying Lugar to the facts of this matter while wrongly distinquishing:

> Polk County v. Dodson, 454 US 312 (1981), and
> Parham v. J.R., 442 US 584 (1979);

and ignoring:

> Moose Lodge No. 107 v. Irvis, 407 US 163 (1972),
> Flagg Brothers, Inc. v. Brooks, 436 US 149 (1978),
> Rendell-Baker v. Kohn, 457 US 830 (1982), and
> Blum v. Yaretsky, 457 US 991 (1982).

Because the circuit court's decision is in conflict with all seven of the cited decisions (Lugar, Polk County, Parham, Moose Lodge, Flagg Brothers, Rendell-Baker

and Blum), and because the application of the Lugar rationale to the facts of this case broadens ominously the scope of section 1983 jurisdiction, we ask that this court review the decision below by writ of certiorari.

1. Lugar is expressly inapplicable.

This Court's decision in Lugar was based upon a line of cases in which this Court entertained and adjudicated claims of defendant debtors from whom property had been seized upon the instigation of a creditor aided by state agents, and where the debtors asserted that the procedure under which the property was seized was violative of constitutional due process standards. Lugar v. Edmondson Oil Co., Inc., 457 US 922, 933, citing Sniadach v. Family Finance Corp., 395 US 337 (1969); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 US 601 (1975); and Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974).

In Lugar this Court held only that if defendant debtors could use Section 1983 to challenge their creditors' actions in a property seizure (based on the Sniadach line of cases) then the Lugar plaintiff-debtors could use Section 1983 to challenge the defendant creditor's actions in a similar property attachment case. 457 US at 934.

The Lugar Court had emphasized that even where governmentally-created rights and privileges were present, the actions of the party whose conduct was challenged had to be ascribed to some governmental decision in order to invoke Section 1983. 457 US at 938, citing Moose Lodge No. 107 v. Irvis, 407 US 163, 177 (1972).

Further, action by a private party pursuant to state statute, without something more, was held insufficient to justify a characterization of that party as a "state actor." 457 US at 938-39 and 939

n. 21, citing Flagg Brothers, Inc. v. Brooks, 436 US 149, 157.

The holding in Lugar to the effect that "joint participation" with the State or its agents makes one a "state actor" for Section 1983 purposes was expressly limited to a party's utilization of "a system whereby state officials will attach property on the ex parte application of one party to a private dispute." 457 US 942. The court of appeals erred in using the "joint participation" test to find the guardian Allen Childress to be a state actor for 1983 purposes in the instant situation, so far afield from a debtor-creditor property attachment.

Our circuit court of appeals had held previously that the Lugar holding is "limited to prejudgment attachment situations...", properly refusing to find state action or state "actors" in an eviction proceeding involving an asserted

infringement of First Amendment rights. Deal v. Newport Datsun Ltd., 706 F.2d 141, 142 (1983). The failure of the court of appeals to hold to its own correctly narrow view of Lugar contributes to the confusion created by application of Lugar to the facts of the instant case.

That Lugar was here misapplied is shown more clearly by examination of two cases quoted at length therein, which show that the impetus for the acts complained of must come from the state in order to make a party into a state actor. Jackson v. Metropolitan Edison, 419 US 345 (1974) held that state regulation of a public utility, even coupled with state approval of its rate and service termination tariffs, did not make the utility into a state actor in a case challenging due process deficiencies in termination of service. The utility's "exercise of the choice allowed by state law where the initiative comes from it and

not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." 419 US at 357.

Detailed state regulation of the serving of liquor in a private club which declined to admit Negroes as members or guests was held not to make that club into into a state actor where the state regulation "cannot be said to in any way foster or encourage racial discrimination." Moose Lodge, supra, 407 U.S. at 176-77.

The conclusion is straightforward: there must be a species of cause and effect relationship between the state law or policy and the conduct of the purported state actor. Accord, Adickes v. S. H. Kress and Co., 398 U.S. 144, 170 (1970) ("... a State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act.")

In the instant case there is no state impetus behind or control over the guardian's actions. The guardian's appointment was not the instance of the declaration of Thomas' incompetency; it was the result of a proceeding initiated by the Gaston County Department of Social Services. See Order Adjudicating the Competency of an Adult, App., infra at 32 and Order Appointing a Guardian for an Incompetent Adult, App., infra at 35. The guardian has no authority to order that his ward be treated or cared for at any institution or program or facility. He has no budget and no staff. The guardian may not be himself involved in providing services to his ward. Respondent's Brief, App. D. at 282-83. His role is to make such decisions as are possible in the circumstances to help Thomas make the best of what third parties may provide. The guardian is not a "state" actor; he acts

for Thomas. See N.C.G.S. Section 35-1.6, Respondent's Brief, App. at A-2.

The state does not control the guardian in the exercise of his guardianship duties, either in law, N.C.G.S. Section 35-1.6(2), or in practice, see Exhibit 2 to Motion of Defendant Morrow for leave to File Separate Brief, filed in this case in the court of appeals on or about December 6, 1984 and reproduced in part, App., infra at 41. The cited exhibit is a letter in which the state's attorney general writes to the state's governor that the attorney general is unaware of any authority whereby the guardian can be required to conform his independent views to those of the state.

We submit that the mere presence of a state statutory scheme regulating guardianship does not make the guardian a state actor any more than liquor regulations or utility tariffs make state actors out of

Moose Lodge No. 107 or Metropolitan Edison Company.

Finally, the concept of "joint participation" suggested by the court of appeals application of Lugar to the instant case would make practically anyone eligible to be a federal defendant. See, e.g., Dahlberg v. Becker, 748 F.2d 85 (2d Cir. 1984) (section 1983 suit unsuccessfully attempted by ex-husband imprisoned under contempt order, against former wife and her attorneys, alleging their joint participation with state officials under New York child support laws); and McDougald v. Jenson, 596 F.Supp. 680 (N.D. Fla., 1984) (ex-husband unsuccessfully sues former wife and judge, alleging their joint participation in obtaining custody decree).

2. Guardianship is a private, not a state function.

This Court declined to find state

action in Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978), where the conduct charged as state action was not traditionally the exclusive function of the state, 436 US at 157-164. The holding in Flagg Brothers was reinforced by this Court's decision in Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

That guardianship is not traditionally a public function is shown by the statutory scheme itself, which in fact gives preference to the appointment of private guardians over public ones, N.C.G.S. Sections 35-1.28(d) and 1.29, and by pertinent case law, which characterizes guardianship as a trust relationship. Owens v. Hines, 227 N.C. 236, 41 S.E.2d 739 (1947).

Federal courts have been hesitant to find state action within a traditionally private relationship. Evans v. Abney, 396 U.S. 435 (1970).

Within the guardianship relationship, parents are presumed to act in the best interests of their children, Parham v. J.R., 442 U.S. at 602, and this Court has found that a public guardian, even one with a financial stake in the type and quantity of care provided, was entitled to a similar presumption. 442 U.S. at 618.

3. The guardian owes loyalty to his ward, not to the state.

The Court of Appeals distinguished Polk County v. Dodson, 454 U.S. 312 (1981), by asserting that the factors insulating the public defender of Polk County from state actor status did not apply where the purported state actor was a custodian of the claimant. Reference to the cited passage of the Polk County opinion reveals citations to Estelle v. Gamble, 429 U.S. 97 (1976), and O'Connor v. Donaldson. 422 U.S. 563 (1975). These cases were distinguished by the Court in Polk County

not on the the basis of custody but on the basis of a division of the loyalty of O'Connor and Estelle between their roles as physician and their roles as custodians and administrators. To suggest simply that custody precludes loyalty is in clear conflict with the precepts of Polk County.

The guardian Allen Childress has no such divided loyalty, and none has been suggested or imputed to him. The Polk County public defender's loyalty to her client and independence from "administrative direction" were measured by the A. B. A. Code of Professional Responsibility. 454 U.S. 327-28 (Burger, Ch. J., concurring). The physicians' decisions challenged in Blum were held to "turn on medical judgments made by private parties according to professional standards..." 457 U.S. at 1008. The guardian's actions are taken according to statutory standards which, contrary to

implicating state control, insulate from it. See discussion at 22-23, supra.

Further, the guardian is also accountable to the Clerk of Court, a judicial official, at the instigation of any party to the original incompetency proceeding or "any other interested person." N.C.G.S. Sections 35-1.37 and 1.38, App., infra at 45.

It is thus clear that the guardian does not share the "obligation to the mission that the State...attempts to achieve" through its institutions or programs, which undermined the independent status of the state-employed doctors in O'Connor and Estelle. Polk County v. Dodson, 454 U.S. 312, 320. A correct reading of Polk County lends no support to the court of appeals decision in the instant case.

A contrary result was reached by the Seventh Circuit Court of Appeals in Quilico

v. Kaplan, 749 F.2d 480 (7th Cir. 1984), interpreting Polk County to support a holding that Veteran's Administration physicians may be separated from the control of their government employer by their "primary and unrequivocal duty to exercise his or her independent judgment." Idem at 484-85.

The court of appeals suggests that the provision of state aid to the guardian, for his ward, makes him a state actor. Drawing state actor status from receipt of resources is contrary to the learning of Rendell-Baker v. Kohn, 457 U.S. 830, where the subject school received 90-99% of its budget from state funds but was not thereby a state actor. 457 U.S. at 840-41. Likewise contrary to the court of appeals use of this index of state actor status is Blum v. Yaretsky, 457 U.S. 991 at 1011, where the Court did not view subsidization of the operating and capital costs of the

facilities and payment of the medical expenses of more than 90% of the patients as converting the action of the nursing homes into "state" action.

"The purpose of the state action requirement is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." Blum v. Yaretsky, supra, 457 U.S. at 1004 (emphasis in original). The precedents of this Court "indicate that a State normally can be held responsible only when it has exercised such coercive power or it has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." Idem, citing Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 166; Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357; Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 and

Adickes v. S. H. Kress & Co., 398 U.S. 144, 170. The record in this case makes clear that the guardian is neither responsible to the State for his choices on behalf of his ward, nor coerced by the State in making these choices. The guardian respectfully submits that the contrary conclusion of the court of appeals is in conflict with applicable decisions of this Court and asks that this petition be granted.

This the 15th day of May, 1986.

LAW OFFICES OF COX AND GAGE

BY: Robert H. Gage
Robert H. Gage
Attorneys for Petitioner

APPENDIX

APPENDIX A.

STATE OF NORTH CAROLINA
COUNTY OF GASTON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE #81 SP 392

IN THE MATTER OF

THOMAS S____,
Respondent.

ORDER ADJUDICATING THE INCOMPETENCY OF AN ADULT

"Gaston County,
Filed Jan 28 1982
at ____ o'clock ___M.
Betty B. Jenkins
Clerk Superior Court"

This matter coming up for hearing pursuant to Article 1A, Chapter 35 of the General Statutes of North Carolina, upon a Petition filed by the Gaston County Department of Social Services on June 4, 1981, requesting that the above-named Respondent be adjudicated incompetent and that a guardian be appointed for him; and being heard by the undersigned Clerk without a jury, who finds by the greater weight of the evidence, the following:

FINDINGS OF FACT

1. That this matter has been continued several times in order to allow completion of the multidisciplinary evaluation requested by the Respondent.

2. That present in Court this date are Petitioner, Gaston County Department of Social Services by and through counsel, Respondent; Respondent's counsel; Mr. James Melton, Director of the Gaston-Lincoln Mental Health Program and witnesses from the Department of Social Services and the Gaston-Lincoln Mental Health Program.

3. That the Court considered as evidence testimony from Danette Rosenberg, Social Worker for the Gaston County Department of Social Services; the Respondent, Thomas S____; a written affidavit from Dr. Suresh Patel, a physician employed by the Gaston-Lincoln Area Mental Health Program; as well as current multidisciplinary evaluations performed on July 30, 1981, and November 9,

1981, by the Division for Disorders of Development and Learning section of North Carolina Memorial Hospital in Chapel Hill, North Carolina.

4. The Court further considered a written report submitted to it by the Respondent's guardian ad liten [sic], the Honorable Edward G. Connette.

Based on the foregoing Findings of Fact, the Court concludes as a Matter of Law:

1. That it has jurisdiction over the subject matter and the parties to this proceeding.

2. That the Respondent is an incompetent adult as defined by General Statute 35-1.7(11).

IT IS, THEREFORE, ORDERED that Thomas S____ be and hereby is, adjudged an incompetent adult. That this matter is continued until 10:00 a.m., January 25, 1982, at which time the Court will consider

evidence as to the appointment of a guardian of the Respondent.

Entered this the 12th day of January, 1982.

Signed this the 28th day of January, 1982.

_____
Betty B. Jenkins
Clerk of Superior Court

(Certificate of Service)

APPENDIX B.

STATE OF NORTH CAROLINA
COUNTY OF GASTON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE #81 SP 392

IN THE MATTER OF
THOMAS S____,
Respondent.

ORDER APPOINTING A GUARDIAN FOR AN INCOMPETENT ADULT

"Gaston County,
Filed Jan 28 1982
at ____ o'clock ___M.
Betty B. Jenkins
Clerk Superior Court"

It appearing to the undersigned Clerk that the Respondent named above was

adjudicated an incompetent adult by this Court on the 12th day of January, 1982, and the Clerk having considered the Order of Adjudication and the findings therein; and having received testimony by interested persons for the purpose of determining who the guardian for the Respondent shall be, makes the following:

FINDINGS OF FACT

1. That present in Court this date are Petitioner, Gaston County Department of Social Services, by and through its counsel; the Respondent, by and through counsel; and Mr. James Melton, the Director of the Gaston-Lincoln Mental Health Program.

2. That the Petitioner has requested that Mr. James Melton, in his official capacity or some other suitable person pursuant to General Statute 122-24.1, be appointed as guardian for the Respondent.

3. That the Respondent has been in

the legal custody of the Gaston County Department of Social Services since shortly after his birth and that the Respondent is now eighteen (18) years of age.

4. That there is no individual willing to serve as guardian of the Respondent; neither is there any domestic corporation willing to serve as guardian and that exhaustive efforts have been made to find such individuals or corporations willing to serve as guardian for the Respondent.

5. That joint efforts by the Gaston County Department of Social Services and the Gaston-Lincoln Mental Health Program have failed to yield appropriate treatment or placement services suitable to the Respondent's needs and that all area and community-based resources have been exhausted.

6. That Respondent's incompetency and inability to attend to his physical,

social, psychological, medical, and other needs stem from mental problems and that it is this Court's opinion that an agency or professional from the mental health field would be the best choice to serve in the capacity as guardian for the Respondent.

7. That the portion of the multidisciplinary evaluation entitled "Return Client Summary" and performed by the Division for Disorders of Development and Learning in Chapel Hill, North Carolina, recommended that guardianship responsibilities for Respondent could best be fulfilled by a Mental Health professional or agency.

Based on the foregoing Findings of Fact the Court concludes as a Matter of Law:

1. That the appointment as guardian of a disinterested public agent as defined by General Statute 35-1.7(4) is necessary.

2. That pursuant to General Statutes

122-24.1, such a disinterested public agent would include officials and employees of the Department of Human Resources, Division of Mental Health, Mental Retardation, and Substance Abuse Services.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED THAT:

1. R. J. Blackley, Director of the Division of Mental Health, Mental Retardation and Substance Abuse Services, 325 North Salisbury Street, Raleigh, North Carolina 27611, be and the same is hereby appointed guardian of the person of the Respondent with the powers and duties set forth in General Statute 35-1.34 except that Mr. Thomas S____ shall retain the right to secure or consent to whatever legal representation he might feel necessary in order to ensure that said Respondent is receiving appropriate treatment, education, training, employment, rehabilitation or habilitation from his

guardian.

2. That letters of guardianship be issued pursuant to General Statute 35-1.18 and FURTHERMORE that jurisdiction of this matter be transferred to the Clerk of Superior Court, Wake County, solely for the purposes of allowing letters of guardianship to issue.

3. That this Court retains jurisdiction of this matter, with the exception of issuing the letters of guardianship, for such further orders as may be necessary in this proceeding.

Entered this the 25th day of January, 1982.

Signed this the 28th day of January, 1982.

_____
Betty B. Jenkins
Clerk of Superior Court

(Certificate of Service)

APPENDIX C.

State of North Carolina
Department of Justice
P.O. Box 629
Raleigh
27802-0629

Rufus L. Edmisten
Attorney General

March 29, 1983

The Honorable James B. Hunt, Jr.
Governor
State of North Carolina
Capitol Building
Raleigh, North Carolina 27602

Re: Thomas S. vs. Morrow, et al.
(C-C-82-0418-M)

Dear Governor Hunt:

The attached correspondence is forwarded to you in accordance with the provisions of G.S. 147-17(b) which requires such action in any case wherein it is "impracticable" for the Attorney General to represent a State agency, employee, etc. The above referenced case is quite unique and the description of the factual backdrop and current posture of the case is

necessary in order to properly evaluate the problems and legal issues involved.

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....
....

On March 28, 1983, the attorneys on my staff responsible for processing this case met at length with Mr. Childress and other personnel from the Division of Mental Health who are familiar with the case. The purpose of this meeting was to formulate final plans for filing a Motion to Dismiss or in the Alternative for Summary Judgment on behalf of Secretary Morrow and Mr. Childress. The bases for this Motion are that the plaintiff has at all times received appropriate treatment, is still receiving appropriate treatment, and that there is no reason to believe that the State will not live up to its responsibilities in the future under the governing state statutes (including the

controversial continuity of care statute). Mr. Childress, at this meeting, refused to agree to the Motion being filed on his behalf. In taking this position, he claimed that he had not felt that the treatment or placement of the plaintiff at Broughton Hospital was appropriate since at least October, 1982, that he did not feel that the plaintiff's present temporary placement is appropriate and that he has concerns about the development of the proposed permanent placement. He unequivocally stated that he did not want representation by the Attorney General inasmuch as he felt that our primary job was to represent the Secretary of Human Resources and that his responsibilities to this ward were paramount in this ligation.

I do not agree with Mr. Childress' negative assessment of the appropriateness of the treatment/placement of the plaintiff. However, I am not aware of any

authority whereby he can be required, as guardian, to espouse different views, nor of any authority permitting me to file the proposed Motion in his name without his permission.

As a result of the above factors, it is evident that I cannot represent Mr. Childress due to: (1) His divergent views from those of Dr. Morrow, (2) His refusal to permit me to act as his counsel, and (3) Anticipated adverse testimony of Mr. Childress at any hearing or trial before the judge or jury in this case.

....

As a result, it is recommended that the employment of counsel to represent Mr. Childress be authorized under the provisions of G.S. 147-17. Due to the present status of the case, prompt action on this recommendation is requested.

Sincerely,
RUFUS L. EDMISTEN
Attorney General

APPENDIX D.

N.C.G.S. Sections 35-1.37 & -1.38.

§ 35-1.37. Clerk's continuing jurisdiction over guardians.

(a) Upon appointment of a guardian, the clerk shall retain jurisdiction of the matter in order to assure compliance with his orders and those of the superior court. He shall have authority to remove a guardian for cause and he shall appoint a successor guardian after removal, death, or resignation of a guardian. He shall have authority to determine disputes between guardians and to adjust the amount of the guardian's bond.

(b) The clerk shall follow the criteria set forth in G.S. 35-1.28 and 35-1.29 in appointing a successor guardian.

(c) Any party to the original proceeding and any other interested person may petition the clerk to exercise the authority conferred on him by this section. (1977, c. 725, s. 1.)

§ 35-1.38. Clerk's continuing jurisdiction over proceedings.

(a) Any interested person may petition the clerk in the county where the guardian was appointed for modification of his order or for consideration of any matter pertaining to the guardianship.

(b) The clerk may order a multidisciplinary evaluation or other evaluation to be made upon the filing of a petition for subsequent proceedings.

(c) The clerk shall treat all petitions for subsequent proceedings filed under this section as motions in the cause.

(d) The petitioner shall obtain from the clerk a time, date, and place for a hearing on the petition, and shall notify the appropriate persons of the hearing on the petition by mailing a copy of the notice and petition at least 10 days prior to the date of the hearing.

(e) If an emergency exists that threatens the physical well-being of the ward, the clerk may enter ex parte an appropriate order pending disposition of the matter at the hearing. (1977, c. 725, s. 1; 1979, c. 751, s. 26.)

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Supreme Court Bar, and that on the 19th day of May, 1986, I have served a copy of the PETITION FOR WRIT OF CERTIORARI by placing the same in the United States Mail, first class postage prepaid, addressed to the following:

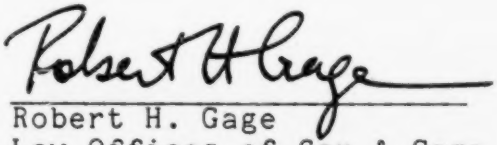
Cathy J. Rosenthal

William O'Connell

and

Wilson Hayman
Assistant Attorney General
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305 College Street
Morganton, NC 28655

No. 85-1895

Supreme Court, U.S.
FILED
JUN 13
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

R. ALLEN CHILDRESS,
PETITIONER,

v.

THOMAS S., appt'd guardian
ad litem, JOYCE BROOKS,
RESPONDENT.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ROBERT H. GAGE
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305 COLLEGE STREET
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(704) 438-4000

ATTORNEYS FOR PETITIONER

NOTE TO SUPPLEMENTAL APPENDIX:

This Supplemental Appendix is filed at the request of the Clerk to replace the Appendices to the Petition for Certiorari in case number 1590, filed previously in this matter by Philip J. Kirk, Jr., and to the Respondents' Brief in Opposition to said Petition.

On May 19, 1986, the same day as the instant Petition for Writ of Certiorari in case number 85-1895 was filed, the Court's order denying the earlier petition in case number 1590 was also filed, thus rendering the appendices to that Petition and Brief in Opposition unavailable for reference.

This Supplemental Appendix first presents Appendices A through E to the Kirk Petition, with original pagination, containing copies of opinions, orders, findings and conclusions of the courts below, and a copy of the judgment sought to

be reviewed.

Next, other materials are presented such that all references in the body of the instant Petition in case number 1895 may be found either in the Appendix bound with that Petition or in this Supplemental Appendix.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-2254

Thomas S., Joyce M. Brooks, appt'd guardian *ad litem*, — Appellee,

versus

Sarah T. Morrow, Secretary of N.C. Dept. of Human Resources,

and

Allen Childress, guardian for pltf.; Benjamin Carpenter, Director of the County Dept. of Social Services; James Melton, Director of Gaston-Lincoln Area Mental Health Program; Harley B. Gaston, Jr., David Beam, David Hollifield, James Forrester, Dean Carpenter, Robert Heavner, Porter McAteet, Gaston County Commissioners, — Defendants.

No. 84-2255

Thomas S., Joyce M. Brooks, appt'd guardian *ad litem*, — Appellee,

versus

Allen Childress, guardian for pltf., — Appellant,

and

Sarah T. Morrow, Secretary
of N.C. Dept. of Human
Resources; Benjamin Carpenter,
Director of the County Dept.
of Social Services; James
Melton, Director of Gaston-
Lincoln Area Mental Health
Program; Harley B. Gaston, Jr.,
David Beam, David Hollifield,
James Forrester, Dean Carpenter,
Robert Heavner, Porter McAteet,
Gaston County Commissioners, Defendants.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge. (C/A C-C-82-0418-M)

Argued: May 9, 1985 Decided: January 9, 1986

Before WINTER, Chief Judge, HALL, Circuit Judge, and BUTZNER, Senior Circuit Judge.

Cathy J. Rosenthal, Associate Attorney General; Robert Gage; Wilson Hayman, Assistant Attorney General (Cox and Gage; Lacy H. Thornburg, Attorney General; William F. O'Connell, Special Deputy Attorney General on brief) for Appellants; Edward G. Connette; Roger Manus (Harper, Connette & Stovall; Carolina Legal Assistance; Theodore O. Fillette; Legal Services of Southern Piedmont, Inc., on brief) for Appellee.

BUTZNER, Senior Circuit Judge:

The primary issue in this appeal is whether the district court properly applied the principles explained in Youngberg v. Romeo, 457 U.S. 307 (1982). In *Youngberg* the Court recognized that a patient in a state mental institution has a right to "adequate food, shelter, clothing, and medical care." 457 U.S. at 315. *Youngberg* also established that a mentally retarded person involuntarily committed to a state institution retains liberty interests secured by the due process clause of the fourteenth amendment in "safety and freedom from bodily restraint." 457 U.S. at 319. These liberty interests "require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint." 457 U.S. at 319. The Court explained that to determine what training "is 'reasonable'—in this and in any case presenting a claim for training by a State—we emphasize that courts must show deference to the judgment exercised by a qualified professional." 457 U.S. at 322.

Although the facts of this case differ from those in *Youngberg,* we conclude that the district court did not err by turning to *Youngberg* for guidance. The district court held that the state should implement a training or treatment plan prescribed by its own professionals for a young incompetent adult who, from birth, has been a ward of the state or of a guardian appointed by the state. Finding no cause for reversal in the assignments of error, we affirm the order of the district court with but slight modification.[1]

I

Thomas S. was placed for adoption by his mother at his birth in 1963. The Gaston County, North Carolina, department of social services took custody of him until his

---

[1] Thomas S. v. Morrow, 601 F. Supp. 1055 (W.D.N.C. 1984). The district court entered a judgment based on the published order and certified it pursuant to Federal Rule of Civil Procedure 54(b).

eighteenth birthday, when he was adjudged incompetent and a guardian was appointed for him. All told, he has lived in more than 40 foster homes and institutions.

Soon after Thomas was born, hospital personnel told the county social worker responsible for Thomas's placement that he was hyperactive and required a "special home to meet [his] needs." Thomas was placed with a licensed foster mother when he was six days old. He lived with her for about five and a half years, until his foster mother "could no longer handle Tom's problems." He then lived in a second foster home for five months. The foster parents asked that he be removed because he bit and clawed the other children and was unable to share, demanding full attention from the foster parents. Thomas was then placed in a group home for disturbed children. He was removed five months later, according to the department of social services, because the group home "could not meet Tom's needs. There was no treatment for him...." In September 1969 Thomas was moved to an institution for emotionally disturbed children, where he remained for one year. There he received therapy and learned to control his inappropriate behavior so he could reside in a less restrictive environment. In September 1970 he was placed in Children's Home of Winston-Salem, where he remained until 1978. During this time, at least four different sets of foster parents gave him occasional respite care.

In February 1977, when Thomas was 13, the social services department decided to reunite him with his mother. Although his mother initially wanted Thomas to live with her, during his visit she decided that she could not cope with him because he was jealous of her other children and physically abused them. He also had tantrums in which he screamed obscenities. Thomas went back to Children's Home and did not see his mother again.

It then became more difficult to cope with Thomas's behavior. He retreated into his own world of model cars, and he attempted suicide several times. In September 1978 he was placed in a receiving home in Gaston County and at the end of that month was placed in Broughton Hospital, one of North Carolina's state mental institutions. He remained there for over a year. At his discharge from Broughton Hospital in February of 1980, Thomas's psychiatrist recommended that he be placed in "a less restrictive setting in the community," preferably "a group home and perhaps later, a halfway house." From February until April 1980, Thomas lived in a group home for emotionally disturbed children. The home requested that he be removed because he frequently ran away and he upset the other children. For the next four weeks, Thomas was housed "in a piece-meal fashion here and there," according to the county department of social services. By May 12, "we had no other place to turn and we brought him to Broughton." At his discharge from Broughton in June 1980, the psychiatrist directing the unit that had cared for him reported that the "[s]taff in all areas affirmed need for Tom to be in less restrictive and less dependent place.... [I]t was felt community placement and outpatient mental health support were appropriate to meet his needs." At Thomas's discharge, he was placed in an emergency shelter in Iredell County and eventually with another foster family.

In June 1981 he was returned to Broughton Hospital, but he was discharged in about a week at his own request and against medical advice. Thomas was then placed at Gerald's Lazy Acres Rest Home for the elderly, where he lived from June 1981 through March 1982.

Thomas reached 18 while living at Lazy Acres, and Gaston County began proceedings to have him declared incompetent. His guardian ad litem sought a psychological and social evaluation of Thomas at the division for disorders of development and learning at North Carolina Memorial Hospital. Psychologists evaluated Thomas's

mental functioning as being on the borderline between average intelligence and mild mental retardation. His social functioning was evaluated as being at "a much lower level," in the moderately mentally retarded range. The social worker on the evaluation team noted that Thomas had "experienced multiple changes in his social environment" in the past ten years. "While a variety of services have been provided him, coordinated planning of services has been difficult and there has been no therapeutic situation available for any length of time since his early adolescence." Consequently, "Tom has lacked for consistent significant persons in his life." The evaluation team concluded that Thomas "needs a stable, very structured environment for three to six years" that would give him "consistency in his social contacts" so that he could "develop trust in interpersonal relationships." Specifically, he needed vocational training, training in social skills, "opportunities for social interaction with peers," and "opportunities to practice in the community the skills he already has and those he will be acquiring before he is discharged from this supervised environment." He "might join a club, participate in structured physical education activities, attend dances or social events." The team summarized: "In planning for Tom, his psychosocial maladjustment is the critical issue that must be addressed."

Thomas was adjudged incompetent. In February 1982 Allen Childress, regional adult mental health specialist with the North Carolina department of human resources, was appointed Thomas's guardian. The guardian visited Thomas at Lazy Acres and decided that the rest home was an inappropriate placement. The guardian later commented on Thomas's condition at the time: "He weighed 197 pounds and was taking five separate medications, which effectively subdued is personality. He was the only person of his age in that rest home. He had no peers in the rest home. He had no social or recreational or educational or vocational opportunities, and no access to therapeutic

counseling." Sleeping, eating, and listening to the radio were Thomas's main activities at Lazy Acres. He gained at least 25 pounds and became emotionally unstable and hallucinatory. He withdrew again into his world of model cars.

The guardian transferred him to the mental retardation unit at Broughton Hospital, in part to enable the guardian to assess Thomas's needs and to enable Gaston County to identify resources to meet those needs. A few weeks after Thomas's admission to Broughton Hospital, a team of social workers, occupational therapists, and psychologists devised his treatment plan.

> The team feels Tom should be ready for community placement in Gaston County in three to six months. He would be able to live successfully in a co-ed group home for adults (ages 13 to 35) with a Vocational Rehabilitation Sheltered Workshop ... or in a CETA on-the-job training program ... during the day.... Counseling through the Department of Social Services and mental health to address medication needs, behavior problems, if they arise, and emotional needs would be required periodically. The home environment would need to be somewhat structured during non-work hours to provide activities therapeutic to Tom's needs and related to his interests (cars, trucks, fishing, bike riding, outdoors activities).
>
> * * *
>
> Tom basically needs to be a part of a home where he can establish family ties in order to mature and develop through the natural progression of growing up to adulthood. He was hardly ever in any one place long enough to put down any roots.

On June 2, 1982, six weeks after Thomas's admission to Broughton, the Broughton social worker on Thomas's treatment team wrote to the Gaston-Lincoln mental health agency to advise it of Thomas's needs upon his anticipated discharge on June 17:

> We have identified the following needs as priority:
>
> 1. Community-based living either in a group home or adult foster care home
> 2. Sheltered Workshop activites or some type of daily vocational training activity
> 3. Involvement with the local mental health center for medication review and counseling to improve his self-concept/self-esteem
>
> The team feels that Tom basically needs to be a part of a home where he can establish meaningful relationships and that will provide sufficient structure to allow him to mature and develop through a natural progression to adulthood. The team feels that in two to five years, Tom should be able to live in a semi-independent or independent living situation in the community after this maturation process has been completed. The home environment should be structured during non-work hours to provide activities responsive to Tom's needs and related to his interests (cars, trucks, fishing, bicycle riding, and outdoor activities).

Thomas was not released on June 17 as planned. In fact, he was not released until March of the following year. Upon receiving the Broughton social worker's recommendation, the director of the Gaston-Lincoln agency advised the social worker and Thomas's guardian that the mental health agency could offer only outpatient counseling, not residential services. The guardian responded that because

of "the obvious inability of the community to care for Tom at this time, I agreed to recommend the continuation of the commitment to give Gaston County extended time to identify resources appropriate to Tom's need."

In October 1982 the hospital social worker contacted the Gaston County department of social services with a recommendation similar to that previously sent to the mental health agency:

> We recommend that Tom be placed in an MR [mental retardation] group home or other highly structured environment for an extended period of time in order to gain the ability to live independently in the community. Placement of choice is a mental retardation group home for high-functioning males which has an Adult Day Activities Program/Workshop capability. This home should be located in an area which is both willing and able to provide counseling services and medication review for Tom.

In November 1982 a two-day psychological evaluation was made by the North Carolina division of mental health and mental services at Broughton Hospital for the purpose of "determining Tom's needs for community placement." The team of psychologists, social workers, and psychiatrists assessed Thomas's weaknesses as his lack of self-direction and his lack of socialization skills. The reporting psychologist explained that "the reason for these deficits is lack of motivation, lack of freedom with appropriate supervision, and the numerous placements which have resulted in a lack of continuity in training." Thomas's score on intelligence tests had improved to the "dull normal" level of intelligence, and the team concluded that Thomas should no longer be diagnosed as mentally retarded. The psychologist also noted that his social maturity score had improved since the evaluation made one year previously at

North Carolina Memorial Hospital. The psychologist attributed this improvement to "the fact that he has been in a stable environment" for the past eight months.

The nine-page evaluation concluded with seven specific recommendations.

1. Placement in a group home with adults of average intelligence without severe emotional difficulties (stable environment with structure)
2. Counseling by both male and female therapists regarding conflicts in establishing relationships with both men and women
3. Needs exposure to many social situations outside of the institutional environment (e.g. shopping, dining out, short trips, etc.)
4. Attend an Outward Bound Course (21-day course) to help develop his ego, strength, and self-concept
5. Placement in an environment that will allow the perfect balance between supervision and freedom so that Tom will not feel rejected
6. Training in mathematics and money management
7. Training in a specific trade like auto mechanics so that Tom will more likely be able to support himself in the future[.]

On November 24, 1982, the Broughton staff devised a discharge plan for Thomas, prefacing it with the evaluation that "he has reached his maximum functioning level within Unit R [the mental retardation unit] and now needs further services in a more normal setting to develop his capabilities." The staff changed Thomas's diagnosis from mild retardation to "adjustment Disorder with Mixed Emotional Features" and noted that "Tom is extremely

aware that he is living with mentally retarded individuals and often voices his thoughts of not wanting to be around 'those retarded people.' We feel this is a normal and healthy reaction to being housed in this situation." The staff reiterated its view that institutional placement was not right for him. "The team feels Tom has received maximum benefit from training and counseling in the institutional setting and is now ready for community placement. Tom no longer requires custodial care in an institutional level, and continued provision of this would be inappropriate." The staff made three recommendations for Tom's residential placement:

> The desired placement for him would seem to be an adult foster care situation in which he would live in a family home with parents who could provide the love and caring and structure that Tom needs to complete the maturation process toward adulthood. He will need Adult Basic Education classes several hours a day and vocational training classes to prepare him for competitive employment. Tom needs assertiveness training to improve his self-concept. This could be possibly accomplished through a three-week course at the Outward Bound School.
>
> A second choice of the team for placement would be a group home for normal adults with a structured environment consisting of the education classes, work skills training, and somewhat structured leisure time. A third choice of placement would be a family care home providing similar services.

Thomas was released from Broughton on March 3, 1983.[2] For the next nine months he lived with a foster family in Cleveland County. According to his guardian,

---

[2]This release was pursuant to the consent decree mentioned in Part II, *infra*.

> [Thomas] functioned as a family member, performing household chores, shopping, and personal care tasks. He completed an internship in training as a nursing home attendant. He participated in karate classes, the Boys Club, and other community activities. He developed friends in the community outside of his foster home.
>
> Tom maintained himself in good physical condition, improved his general appearance through increased grooming and improved clothing, and maintained his weight loss.

Thomas became upset, however, upon being required to have a roommate and upon meeting members of his biological family. Thomas announced his decision to live with his sister, who did not agree to the plan. Thomas then decided to leave the foster home, and a magistrate committed him to Broughton Hospital.

After two weeks at Broughton, he was placed in the McCay group home for developmentally disabled adults in Morganton, where he remained for about five months. He became upset with his roommate and moved out to the home's two-car garage. He also ran away several times and requested the Burke County department of social services to investigate his living situation.

On May 19, 1984, Thomas was placed at a rest home in Wilkes County that housed elderly and emotionally ill adults. Day treatment was available to him at a center several miles from the rest home. Thomas remained at the rest home for three months. In August 1984 he was moved to the Gaston County detoxification and night care facility, where he was living at the time of the district court's entry of final judgment on December 7, 1984.

II

On July 7, 1982, four months after Thomas's second commitment to Broughton Hospital, Thomas S. by his next friend brought this suit against Sarah Morrow, Secretary of the North Carolina department of human resources; Allen Childress, in his official capacity as Thomas's guardian; and the directors of two local agencies, the Gaston County department of social services and the Gaston-Lincoln area mental health program. An amended complaint joined as additional defendants the Gaston County commissioners.

The complaint alleged that the defendants had denied Thomas substantive due process accorded by the fourteenth amendment. It protested the defendants' failure to provide minimally adequate treatment, alleging that Thomas's hospitalization imposed a degree of restraint on his liberty inconsistent with professional judgment concerning his appropriate treatment. It also charged that the defendants had deprived him of liberty interests created by state law. Thomas requested an injunction ordering the defendants to place him in an appropriate group home and to provide other treatment recommended by the professionals who had examined and worked with him.

On May 26, 1983, the court entered a consent order permitting the two local agencies named as defendants to contract with an independent nonprofit organization for foster care and treatment from the date of Thomas's discharge from Broughton until March 1, 1984. Because of the consent order, the court deferred all parties' motions for summary judgment and declared the case inactive until February 1, 1984.

Upon reactivating the case and considerig further motions, the district court on September 18, 1984, ruled on cross motions for summary judgment. The court dismissed all pendent state law claims against state officials, in

accordance with Pennhurst State School and Hospital v. Halderman, 104 S. Ct. 900 (1984). The court also dismissed without prejudice the claims against the local officials. It granted summary judgment against the Secretary of the department of human resources and Thomas's guardian.

On December 7, 1984, the court entered a judgment requiring the Secretary and the guardian to develop a treatment plan and appoint a case manager for Thomas. It directed them to furnish Thomas the treatment recommended by the qualified professionals who had evaluated his needs. In accordance with the recommendations, the order specified that Thomas should be placed in a "stable suitable supervised community residential placement such as: (1) a non-institutional specialized adult foster care situation ... or (2) a group home with adults of average intelligence." Adhering to the recommendations, the court also directed that Thomas should be provided nonresidential services such as mental health counseling, adult basic education and vocational training, and "opportunities for community interaction." The Secretary and the guardian appealed.

III

The Secretary contends that she has not violated Thomas's "fourteenth amendment right to liberty of movement and freedom from restraint." She advances several reasons for reversing the district court's order. She asserts that *Youngberg* is inapplicable because Thomas, in her words, "lives in the community and is not subject to the control of the state," and because in any event he has received minimally adequate treatment consistent with professional judgment. She also contends that, because Thomas is not in a state institution, North Carolina law places responsibility for him on local authorities and not on her department. Finally, she says that the district court erred in granting summary judgment because the record disclosed genuine issues of material fact.

There are, of course, differences between *Youngberg* and Thomas's case. In *Youngberg* the court dealt with a claim for damages against state officials for breach of constitutional rights. 457 U.S. at 311. Thomas does not sue for money; he seeks only the treatment that professionals at a state hospital have prescribed. But this distinction between the cases does not militate against Thomas. The principles undergirding the Court's decision in the action for damages afford a sound foundation for the exercise of equitable powers to fashion remedial, prospective relief. *See* Scott v. Plante, 691 F.2d 634, 637 (3d Cir. 1982). Much of *Youngberg* necessarily addresses the situation of a single patient confined to an institution, but the Court did not intend the liberty interests it identified to be limited to these circumstances. The liberty interests protected in *Youngberg* did not arise because of the institutional confinement. Rather, the Court's premise was that involuntary commitment and other lawful confinement "do not extinguish" pre-existing liberty interests in safety and freedom from bodily restraint. 457 U.S. at 315.

Although during the course of this litigation Thomas's lodging has changed from a state hospital to a night care unit at a detoxification center, his status has not changed. He remains a legally incompetent adult who is a ward of a guardian appointed by the state. He did not choose to live at the detoxification center, and he is neither an alcoholic nor a drug addict. *Youngberg* does not suggest that an incompetent person sheds the basic liberty interests that the Court identified when state officials and his guardian move him from one facility to another.

In *Youngberg,* the Court recognized that it is not feasible to specify the type of training for every case. Nevertheless, it explained principles that are broad enough to govern diverse factual situations. With respect to a state's duty to provide training, the Court said: "The basic requirement of adequacy ... may be stated as that training which is

reasonable in light of identifiable liberty interests and the circumstances of the case." The Court coupled this definition with the admonition to "identify a constitutional predicate for the imposition of any affirmative duty on a State." 457 U.S. at 319 n.25. Moreover, the Court emphasized that in determing what is reasonable "in any case presenting a claim for training by a State ... courts must show deference to the judgment exercised by a qualified professional." 457 U.S. at 322.

The district court followed *Youngberg's* precepts. It identified as a constitutional predicate to its decree Thomas's liberty interests in safety and freedom from undue restraint. In fashioning a remedy, it relied on the recommendations of the state's professionals at Broughton Hospital. The district court did not err in finding that treatment and training based on the recommendations were reasonable in light of Thomas's liberty interests and the circumstances of the case. Tom's safety was threatened by his aggressiveness and his attempted suicide. These problems were fully documented and well known to the team of professionals who evaluated him and prescribed corrective treatment. With respect to Thomas's interest in freedom from undue restraint, the professionals at Broughton noted: "Maximum of invivo [sic] exposure to the community is essential (night hospitalization and full time day involvement in the local community could be considered as one possibility to start with)." Their recommended treatment included transfer from the hospital to a group home in the community.

The Secretary's assertion that Thomas has received minimally adequate treatment consistent with professional judgment is not supported by the record. Although the professional team at Broughton suggested that night hospitalization could be considered a possibility to start Thomas's treatment, the night care unit at the detoxification center is designed for persons "able to respond to short

term night care for 7-14 days." Thomas was lodged there for months. No professional has taken the position that lodging him in a night care unit operated in conjunction with a detoxification center is compatible with the treatment prescribed for him. Assignment to this lodging appears to have been based on expediency and a decision to save money.

Youngberg points out that lack of funds is an absolute defense to an action for damages brought against a professional in his individual capacity. 457 U.S. at 323. But the Court did not apply this precept to prospective injunctive relief. Instead, the Court explained that qualified professionals, to whom the courts owe deference, may consider the burden on the state when they prescribe treatment. 457 U.S. at 322 and n.29. The Court did not allow the professionals free rein, however. A decision about treatment made by a professional is presumed valid, but a court may reject it when it "is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." 457 U.S. at 323.

There is no evidence that the evaluation team at Broughton who prescribed Thomas's treatment did not take costs into consideration. One cannot assume that the qualified professionals drafted prohibitively expensive recommendations. The presumption of validity accorded the professionals' decision about appropriate treatment has not been rebutted. Consequently, in the absence of evidence that the decision is a "substantial departure from accepted professional judgment, practice, or standards," the district court was required to accept the recommendations of the qualified professionals at Broughton. *See* 457 U.S. at 323.

Society for Goodwill to Retarded Children, Inc. v. Cuomo, 737 F.2d 1239 (2d Cir. 1984), and Phillips v. Thompson, 715 F.2d 365 (7th Cir. 1983), on which the Secretary relies, do not counsel that Thomas be denied relief. As the Secretary emphasizes, these cases stand for the proposition that there is no right to placement in the community. But neither of these cases involved a professional's judgment concerning the appropriate treatment for a specific individual. In *Society for Goodwill* the district court's order that 400 mentally retarded patients be placed in the community by 1987 was reversed. In *Phillips* the district court's refusal to place a class of several hundred mentally retarded adults in the community was affirmed. Thus, these decisions do not apply to the facts in Thomas's case, in which a discrete recommendation for treatment was made by qualified professionals to meet the needs of an individual, as contemplated by *Youngberg*, 457 U.S. at 319 n.25.

The Secretary argues that North Carolina law makes local mental health authorities responsible for Thomas's treatment in the community. The local authorities asserted that the state, acting through the department of human resources, is responsible.

By statutory definition, the Secretary's department is "[t]he unit of State government authorized to implement, administer, and monitor community-based programs in cooperation with local governmental authorities . . . ." N.C. Gen. Stat. §122-35.36(6). This and related statutes justify the district court's ruling that the state, acting through the Secretary, was responsible and that the Secretary at her election could provide the required treatment through local authorities. The district court's understanding of the relationship between the Secretary and local authorities is supported by Vaughn v. North Carolina Department of Human Resources, 296 N.C. 683, 252 S.E 2d 792 (1979). *Vaughn* holds that within the

meaning of the Tort Claims Act a county director of social services and his staff act as agents of the state department of human resources with respect to the placement of children in foster homes. *Accord* Milner v. Trend Community Mental Health Services, Docket TA 7353 (N.C. Indus. Comm'n Nov. 10, 1981), *aff'd* (N.C. Indus. Comm'n July 28, 1982) (for purposes of Tort Claims Act, doctors employed by local mental health authority are agents of department of human resources).

Finally, we reject the Secretary's claim that genuine issues of material fact preclude summary judgment. Although the evidence presented in Thomas's behalf is voluminous, the district court did not rest on it. Instead, the court based summary judgment on the report and recommendation of the Secretary's professionals at Broughton Hospital, which were introduced into evidence by the Secretary. The guardian, through his counsel, also acknowledged:

> What Tom needs is as follows:
>
> a. A room to stay in, to meet his needs for privacy, within a supervised home with resident managers;
> b. Provision of meals at scheduled times;
> c. Developmental skills training, in self care and housekeeping as needed;
> d. Outside program resources, as needed:
>
> i. Vocational training
> ii. Psychosocial rehabilitation
> iii. Adult basic education
> iv. Individual therapeutic counselling
> v. Supportive/behavioral counselling and
> vi. Case management.
>
> This represents a consensus of those involved in Tom's treatment for the past 1-½ years. If his

> needs are many, we point out that substituting for twenty years of no family and little or no treatment is not an easy thing.

The remedy ordered by the court responds to these needs. There is no genuine issue of material fact about them or about the recommendations on which the order is based.

In sum, we find in the record no warrant for reversing the district court's order granting summary judgment and requiring implementation of the treatment and training prescribed by qualified professionals at Broughton Hospital.

IV.

The district court directed both the guardian and the Secretary to furnish Thomas specific treatment based on the recommendation of qualified professionals. The court also directed the guardian to "exercise his duties and responsibilities to the full extent required by N.C. Gen. Stat. § 35-1.34 and in a manner not inconsistent with the judgment." It absolved the guardian from personal responsibility for providing funds or resources for the treatment that it ordered.

The guardian assigns error to the district court's order on three grounds. He contends that the court lacks jurisdiction over him on the basis of 42 U.S.C. § 1983, because he has not acted under color of state law and because his actions cannot be attributed to the state. He argues that because he is a fiduciary, not a care giver, he is not subject to the requirments of *Youngberg*. Finally, he asserts that the eleventh amendment deprives the court of jurisdiction to instruct the guardian on the performance of his duties prescribed by state law. The guardian does not assign error to any of the specific provisions pertaining to

the treatment ordered by the court. Indeed, throughout this litigation the guardian has tried to secure for Thomas the treatment recommended by the professionals.

We find that jurisdiction over the guardian is proper under 42 U.S.C § 1983. In Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982), the Court explained that "conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State." The Court then outlined a two-part test for determining whether a defendant's acts may be attributed to the state. The first component of the test, the "under color of state law" requirement of § 1983, is satisified if the deprivation is "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." 457 U.S. at 937.

In this case the guardian's authority over Thomas is a "right or privilege created by the State." By statute, "[t]he essential purpose of guardianship is to replace an individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions." N.C. Gen. Stat. § 35-1.6(3). A panoply of provisions empowers the guardian to implement this broad legislative purpose. Among the guardian's powers are the authority to establish his ward's domicile and to provide for his training and treatment. N.C. Gen. Stat. § 35-1.34(a)(1) and (a)(2). North Carolina law also authorizes the guardian to "give any consent or approval that may be necessary to enable the ward to receive medical, legal, psychological, or other professional care, counsel, treatment, or service." N.C. Gen. State. § 35-1.34(a)(4). Exercising his authority to make decisions for Thomas, the guardian arranged that Thomas be placed at Broughton Hospital and agreed to the temporary continuation of the commitment.

The guardian's reliance on Polk County v. Dodson, 454 U.S. 312 (1981), is misplaced. In *Polk County* the Court held that a public defender does not act under color of state law within the meaning of § 1983. Nevertheless, as the Court in *Polk County* pointed out, one who performs a custodial function pursuant to state law falls within the scope of § 1983. *See* 454 U.S. at 320. There can be no doubt that the guardian has custody of his ward, Thomas. N.C. Gen. Stat. § 35-1.34(a)(1).

The second component of the *Lugar* test of a cause of action under § 1983 inquires whether the defendant "may fairly be said to be a state actor." 457 U.S. at 937. In this case the guardian is properly characterized as a state actor because "he has acted together with or has obtained significant aid from state officials. . . ." 457 U.S. at 937. Working with the state hospital and with officials from local agencies, the guardian had Thomas admitted to Broughton Hospital and to succeeding placements. In *Lugar* the Court recognized that "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." 457 U.S. at 941, *citing* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970). The actions of the guardian in joining with state officials to have Thomas moved from place to place irrespective of Thomas's will are legally indistinguishable from the seizure challenged in *Lugar*.

The guardina relies in part on Parham v. J.R., 442 U.S. 584 (1979), as authority for the proposition that a guardian appointed by the state is not a state actor for purposes of 42 U.S.C. § 1983. In *Parham* the Court ruled that the procedural due process required by the fourteenth amendment was the same when either a parent or a guardian sought to admit a child to a state mental hospital.

The guardian contends that this ruling and the reasoning underlying it establish that the guardianship is associated with the interests of the ward and is identified with parental rather than state control.

We cannot accept the argument that *Parham* requires dismissal of the guardian. In the first place, the question of the guardian's status as a state actor for the purpose of § 1983 was not before the Court in *Parham*. In the second place, the Court observed that there may be a difference in procedures required for reviewing a ward's need for continuing care as compared with the procedures required to review a similar need of a child with natural parents. The Court acknowledged the risk that a child without natural parents may be "lost in the shuffle." 442 U.S. at 619. It noted that the ward's commitment to the institution may have been prolonged because his guardian had difficulty finding a foster home. This situation is quite similar to the one that confronts Thomas. Rather than dismissing the guardian, as Thomas's guardian asks us to do, the *Parham* Court remanded the case for consideration of the issue of whether wards of the state should be treated differently from children with natural parents with respect to their long-term placement.

We conclude that the guardian acted under color of state law and that he is a state actor for purposes of jurisdiction under § 1983. Moreover, the guardian was properly joined under Rule of Civil Procedure 19. The powers of the guardian are so pervasive that in his absence complete relief cannot be afforded Thomas. The guardian is subject to service of process and his joinder will not deprive the court of jurisdiction over the subject matter of the action.

The guardian argues further that "a defendant whose responsibility to plaintiff does not derive from direct provision of care cannot be brought to task under *Youngberg*." The guardian points out that he was

appointed under a state law requiring that a "disinterested public agent" serve as guardian of an incompetent when no private individual or corporation can be found who is willing to serve. N.C. Gen. Stat. § 35-1.29. By law, the "disinterested public agent" must be "an adult officer, agent, or employee of a State human resources agency who has no immediate responsibilities for providing services to a ward. . . ." N.C. Gen. Stat. § 35-1.7(4).

Nevertheless, the guardian's responsibilities cannot be distinguished from those of the defendants in *Youngberg* on the ground that the guardian has no immediate responsibility for providing services to his ward. The defendants in *Youngberg* were the administrators of the state hospital to which the respondent had been committed. 457 U.S. at 310 n.3. They had custody of the patient and were responsible for making decisions concerning his treatment and training. Similarly, the guardian has legal custody of Thomas and is responsible for making decisions concerning his treatment. We agree with the guardian, however, that Pennhurst State School and Hospital v. Halderman, 104 S. Ct. 900 (1984), precludes a federal court from directing a state official to perform the duties imposed on him by state law. Consequently, on remand the district court should delete from its order the direction to the guardian pertaining to the exercise of his duties under state law. This modificaiton of the decree does not relieve the guardian from all responsibility with respect to the relief the district court ordered. He must, as the district court required, exercise his authority over Thomas in a manner not inconsistent with the court's judgment. This obligation remains as a matter of federal law. He cannot act under color of state law to infringe the liberty interests secured by the fourteenth amendment that are the subject of this litigation.

The judgment entered against the Secretary is affirmed. The judgment entered against the guardian is affirmed, subject to modification consistent with this opinion. The case is remanded to the district court.

APPENDIX B

UNITED STATE COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 84-2254

Thomas S., Joyce M. Brooks,
appt'd guardian *ad litem*,

Appellee,

versus
Sarah T. Morrow, etc.,

Appellant,

and
Allen Childress, etc., et al,

Defendants.

N. 84-2255

Thomas S. Joyce M. Brooks,
appt'd guardian *ad litem*,

Appellee,

versus
Allen Childress, etc.,

Appellant,

and
Sarah T. Morrow, etc., et al,

Defendants.

Appeals from the United States District Court for the
Western District of North Carolina, at Charlotte.
James B. McMillan, District Judge.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Winter for a panel consisting of Chief Judge Winter, Judge Hall, and Judge Butzner.

For the Court,

/s/ John M. Greacen
CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 84-2254

Thomas S., etc.,

Appellee,

versus
Sarah T. Morrow, etc.,

Appellant,

and
Allen Childress, etc., et al,

Defendants.

No. 84-2255

Thomas S., etc.,

Appellee,

versus
Allen Childress, etc.,

Appellant,

and
Sarah T. Morrow, etc., et al,

Defendants.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte.
James B. McMillan, District Judge

Upon consideration of appellant Sarah T. Morrow's motion for stay of mandate pending application to the United States Supreme Court for writ of certiorari,

IT IS ORDERED that the motion is denied.

For the Court—By Direction

/s/ John M. Greacen
CLERK

APPENDIX D

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
Charlotte Division
C-C-82-418-M

THOMAS S., by his next friend,
Joyce Brooks,

Plainti

-vs-

SARAH MORROW, Secretary, North Carolina Department of Human Resources; ALLEN CHILDRESS, in his official capacity as guardian for the plaintiff; BENJAMIN CARPENTER, Director, Gaston County Department of Social Services; JAMES MELTON, Director, Gaston-Lincoln Area Mental Health Program; HARLEY B. GASTON, JR., DAVID BEAM, DAVID HOLLIFIELD, JAMES FORRESTER, DEAN CARPENTER, ROBERT HEAVNER, and PORTER McATEER, in their official capacity as Gaston County Commissioners,

Defendant

Edward G. Connette, Post Office Box 36726, Charlott North Carolina 28236; Roger Manus, Carolina Leg Assistance for Mental Health, Post Office Box 244 Raleigh, North Carolina 27611; and Theodore O. Fillett Legal Services of Southern Piedmont, Inc., 951 Sou Independence Boulevard, Suite 600, Charlotte, Nor Carolina 28202, counsel for plaintiff.

Wilson Hayman, Assistant Attorney General; Reginald L. Watkins, Assistant Attorney General; William F. O'Connell, Special Deputy Attorney General; Walter M. Smith, Associate Attorney, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602; Catherine C. Stevens, Post Office Box 1578, Gastonia, North Carolina 28052; R. T. Wilder, Jr., Mullen, Holland & Cooper, 316 South Marietta Street, Post Office Box 488, Gastonia, North Carolina 28052; Jeff Trepel, Post Office Box 995, Gastonia, North Carolina 28052; and Robert H. Gage, Cox & Gage, 305 College Street, Morganton, North Carolina 28655, counsel for defendants.

Before James B. McMillan, District Judge

I.

Paul Caldwell, next friend of plaintiff Thomas S., filed this suit on July 7, 1982, seeking declaratory and injunctive relief for Thomas S. under federal and state law. Paul Caldwell later became employed by defendants, and Joyce Brooks now serves as next friend.

Thomas S., a twenty-year-old Gaston County resident, has been diagnosed as suffering from, *inter alia*, schizophrenia and borderline mental retardation, and is incapable of either living independently or managing his own affairs. Given up for adoption at birth, Tom spent his first eighteen years in approximately forty different foster homes and institutions while in the custody of the Gaston County Department of Social Services (DSS). DSS shuffled Tom through so many placements during his youth (*see* deposition of Dannette Rosenberg, pp. 10-15) because there were no appropriate community-based treatment facilities available in Gaston County during this period (defendant Morrow's answer, ¶ 17; defendant Carpenter's answer, ¶13).

Soon after Tom's eighteenth birthday, DSS succeede having Tom declared legally incompetent, and defend Allen Childress, Regional Adult Mental Health Specia of the Department of Human Resources (DHR), Divis of Mental Health, Mental Retardation, and Substa Abuse Services, was thereafter appointed guardian un the authority of N.C.G.S. §§122-24.1 and 35-1.28. Beca Childress considered Tom's then-current placement in propriate, Childress caused Tom to be admitted to the (mental retardation) unit at Broughton Hospital on Ma 15, 1982.

Four months after Tom was institutionalized Broughton, his next friend brought this suit against st and local officials seeking judicial declaration that To rights under the United States Constitution and under st law had been denied by defendants, and seek prospective injunctive relief to remedy the alleged wro The complaint alleged that, under federal and state l Tom is entitled to more appropriate treatment of condition in a less restrictive, community-based setting. May 26, 1983, plaintiff and two of the local defenda agreed to a special treatment plan funded by th defendants which provided appropriate community-ba treatment for Tom until March 1, 1984. That agreem was incorporated into a judgment, and, because of t judgment, the court deferred ruling on all parties' moti for summary judgment. The court designated the case inactive until February 1, 1984. Since the consent judgm was filed, Tom has been shifted to at least three additio placements. He is now being housed in the Gaston Cou detoxification facility because there is no place else for h to go. Letter from plaintiff's counsel, Edward G. Conn (filed August 29, 1984).

Meanwhile, the parties, and others, have filed a number of additional motions. All parties have renewed their motions for summary judgment. Other mentally impaired persons have moved that they be allowed to intervene, and have joined plaintiff in a motion to amend the complaint and to certify a class. The local defendants have moved that, in the event a statewide class is certified, all claims against the local defendants be severed from the class action case.

On August 15, 1984, the court heard argument on those motions.

II.

All pendent state law claims should be dismissed. *Pennhurst State School & Hospital v. Halderman,* 52 U.S.L.W. 4155 (January 23, 1984), is dispositive of those claims. *Pennhurst* held that the Eleventh Amendment prohibits federal courts from adjudicating pendent claims against state officials based on those officials' alleged violations of state law.

Also in *Pennhurst,* however, the Supreme Court reaffirmed the established principle that federal courts do have jurisdiction to grant relief against state officials based on those officials' alleged violations of federal law. *Id.,* at 4160; *Ex parte Young,* 209 U.S. 123 (1908). "[I]n such cases this Court is vested with the constitutional duty to vindicate 'the supreme authority of the United States' ...." *Pennhurst,* at 4160, fn. 17.

III.

Plaintiff is entitled to summary judgment based on his constitutional claims against defendants.

A

Plaintiff claims that his liberty—a substantive right arising solely under the Fourteenth Amendment to the Constitution—has been denied by the defendants. The seminal case on this "substantive due process" claim is *Youngberg v. Romeo,* 457 U.S. 307 (1982). *Youngberg* discussed "the substantive rights of involuntarily committed mentally retarded persons under the Fourteenth Amendment to the Constitution." *Id.,* at 314.

Although *Youngberg* discussed the constitutional rights of a severely retarded, institutionalized individual, the standards outlined in that case are appropriate to this case. The parties are in dispute about whether Tom is mentally retarded, but they agree that he suffers from mental impairments which prevent him from living independently and which necessitated the appointment of a guardian. Tom is not now institutionalized, but he was so placed at the time the suit was filed, and, as a ward of the state, Tom at any time may be required to return to Broughton, if his guardian so directs. Therefore, Tom is like the plaintiff in *Youngberg* insofar as the state has control over Tom's liberty and care.

The holding in *Youngberg* dictates that defendants Morrow and Childress are responsible for ensuring that plaintiff retains the liberty to which he is entitled solely under the Fourteenth Amendment. Defendant Childress, regional specialist for DHR, was plaintiff's guardian and caused plaintiff to be admitted to Broughton on March 15, 1982. Defendant Morrow is Secretary of DHR and is

responsible for the administration of DHR as well as the supervision of county deparments of social services.

Morrow and Childress, like the institution officials in *Youngberg,* are responsible for the legitimate restraints on plaintiff's liberty resulting from plaintiff's mental incompetency and wardship; also like the defendants in *Youngberg,* Morrow and Childress are charged with the responsibility that these legitimate restraints are no more restrictive than necessary.

Liberty interests protected by the Fourteenth Amendment include safety, liberty from bodily restraint, and "minimally adequate or reasonable training to ensure safety and freedom from undue restraint." *Id.* at 319.

The training to which plaintiff is entitled under the Fourteenth Amendment is that which is "reasonable" in light of the "balance [between] 'the liberty of the individual' and 'the demands of an organized society.'" *Id.* at 320. "In determining what is 'reasonable'—in this and in any case presenting a claim for training by a State—we emphasize that courts must show deference to the judgment exercised by a qualified professional." *Id.* at 322.

> The decision [to treat a certain way], if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id. at 323. This court, therefore, in determining the training or treatment to which plaintiff is entitled under the Fourteenth Amendment, must look for guidance to the professional judgment and decisions of those who examined and treated him.

Defendants recently have been filing affidavits asserting, at least in part, that plaintiff has a behavioral problem which makes it difficult to treat him. *See, e.g.*, affidavit of James B. McKelvey, dated August 30, 1984; affidavit of Rudy Cannon, dated August 27, 1984. The court fails to see how that fact can excuse defendants from providing the treatment to which plaintiff is entitled. People with problems are rarely easy to deal with. If plaintiff were "normal," then he would not need the treatment the professionals say he needs. The solution to whatever behavioral problems plaintiff may have is *not* to place him inappropriately in a detoxification facility; it is to provide him with appropriate treatment.

The overwhelming weight of professional opinion concerning the appropriate treatment needs of Thomas S. appears to be consistent with the recommendations formulated by the R Unit treatment team as set forth in the psychological evaluation dated November 22, 1982, and signed by Staff Psychologist William R. Wellborn, III:

RECOMMENDATIONS

1. Placement in a group home with adults of average intelligence without severe emotional difficulties (stable environment with structure)

2. Counseling by both male and female therapists regarding conflicts in establishing relationships with both men and women

3. Needs exposure to many social situations outside of the institutional environment (e.g. shopping, dining out, short trips, etc.)

4. Attend an Outward Bound Course (21-day course) to help develop his ego, strength, and self-concept

5. Placement in an environment that will allow the perfect balance between supervision and freedom so that Tom will not feel rejected

6. Training in mathematics and money management

7. Training in a specific trade like auto mechanics so that Tom will more likely be able to support himself in the future

Defendant Morrow's *Memorandum in Support of Motion to Dismiss, or Alternatively, Motion for Judgment on the Pleadings or, Alternatively, Motion for Summary Judgment,* Exhibit 7, page 9 (March 31, 1983). Details of the recommended appropriate treatment vary according to the professional making the assessment, but the basic, common elements appear to be:

1. A stable environment — i.e., a relatively permanent placement.
2. A non-institutional adult foster care situation which would allow Tom to function as a family member with some supervision but with relatively few restrictions.
3. Basic educational training and vocational training.
4. Therapy and counseling.

See, e.g., Affidavit of Rudy Cannon (filed August 30, 1984).

Defendants have filed a large number of affidavits which, defendants claim, show that the haphazard, inconsistent

treatment provided for plaintiff was consistent with the recommendations of professionals. *See, e.g.,* affidavits attached to defendant Morrow's *Memorandum in Support of Motion to Dismiss, or Alternatively, Motion for Judgment on the Pleadings or, Alternatively, Motion for Summary Judgment* (filed March 31, 1983). However, scrutiny of those affidavits, coupled with an examination of the deposition excerpts and affidavits submitted by plaintiff, shows that most of the treatment provided for plaintiff was not consistent with that recommended by the professionals. *See, e.g.,* affidavits of Paul Caldwell, Dr. Jacelyn Wedell-Monnig, Dr. Carolyn Schroeder and depositions of Allen Childress (pp. 11-12, 37-39, 93) and Benjamin Carpenter (p. 12) (filed May 6, 1983). To the extent that any professionally prescribed treatment differed from that set forth above, it differed because the professional's stated judgment was modified to conform to the *available* treatment, rather than to the *appropriate* treatment, for plaintiff's condition.

Lack of funding or of established alternatives is not a factor which may be considered in determining the scope of this constitutional right. Of course, that factor is critical in determining whether *damages* may be recovered by one who was denied his right to appropriate treatment.

> In an action for damages against a professional in his individual capacity, however, the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability.

Youngberg, at 323. Just as certainly, however, consideration of budgetary constraints is not proper when *defining* this constitutional right. To the extent that a professional's judgment of the appropriate treatment is shown to have been modified to fit what is available, that judgment likely

has become "a substantial departure from accepted professional judgment, practice, or standards." The Supreme Court in *Youngberg* recognized that "normal professional standards" (or professional judgment) and "budgetary constraints" are separate concepts ("the professional will not be liable if he was *unable to satisfy his normal professional standards because of budgetary constraints" Id.*, at 323 [emphasis added]).

Nor are budgetary constraints restrictive of a court's equitable authority and power in fashioning prospective relief after determining that this constitutional right has been violated. *See, e.g., Wyatt v. Stickney*, 344 F.Supp. 387, 394 (M.D.Ala. 1972), *affirmed in part*, remanded in part and decision reserved in part sub nom. *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). *Accord, Scott v. Plante*, 691 F.2d 634, 637 (3d Cir. 1982):

> Obviously the problem of hindsight interference with decisions made by hard-pressed professional staff members of state mental institutions is a more serious one than that of assisting them in directing prospective injunctive relief against appropriate state officials. *See Edelman v. Jordan*, 415 U.S. 651, 667, 94 S.Ct. 1347, 1357, 39 L.Ed.2d 662 (1974).

For the foregoing reasons, the court concludes that defendants Morrow and Childress have denied and continue to deny plaintiff his rights under the Fourteenth Amendment. Plaintiff is entitled to treatment recommended by qualified professionals whose judgment is unsullied by consideration of the fact that the state does not now provide appropriate treatment or funding for appropriate treatment.

Plaintiff is therefore entitled to prospective injunctive relief.

B

Plaintiff also claims his state-created liberty interests — i.e., those conferred on plaintiff by North Carolina law — were taken from him by defendants without due process of law, and, thus, in violation of his rights under the Fourteenth Amendment to the Constitution. In particular, plaintiff claims that the North Carolina General Statutes, §§ 35-1.6 *et seq.*, (the North Carolina Guardianship Act); § 122-55.8, (the Continuity of Care Statute); § 143B-137; and § 168-1 create liberty interests which may not be deprived without due process of law. In support of this "procedural due process" claim, plaintiff cites *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Vitek v. Jones*, 445 U.S. 480, 488, 100 S.Ct. 1254, 1261, 63 L.Ed.2d 552 (1980); and *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7, 99 S.Ct. 2100, 2103, 60 L.Ed.2d 668 (1979). (State-created liberty interests, like federally derived constitutional rights, trigger the procedural protections of the Fourteenth Amendment.)

Defendants assert that this claim is foreclosed by *Pennhurst State School & Hospital v. Halderman, supra. Pennhurst,* however, does not go so far. *Pennhurst* held only that federal courts may not exercise pendent jurisdiction to adjudicate claims of state law violations against state officials. A "procedural due process" claim is an entirely different sort of action. The role of state law in this constitutional claim is merely to *define* the liberty interest at stake. In order to prevail, plaintiff must show that his *procedural* rights *under the Constitution* were not provided when the state took away plaintiff's state-created right to a particular form of liberty. Such a suit, then, is not an enforcement of state law, but an enforcement of federal constitutional law. As the Court said in *Pennhurst*, "[I]n such cases this Court is vested with the constitutional duty to vindicate 'the supreme authority of the United States' ...." *Pennhurst*, 52 U.S.L.W. at 4160, fn. 17.

Plaintiff argues that this cause of action entitles him to the same prospective relief afforded under his "substantive due process" claim, since the "professional judgment" of those who have treated plaintiff is that he should be placed in a less-restrictive, community setting with enriching treatment. Defendants deny that many of the statutes even apply to plaintiff. They also say that, even if the statutes apply, plaintiff is not entitled to relief.

Since the court already has determined that plaintiff is entitled to relief based on his rights derived solely from the Fourteenth Amendment, the court need not reach this second constitutional claim for relief asserted by plaintiff. The court recognizes that state *and* local defendants, rather than just defendants Morrow and Childress, would share responsibilities should plaintiff recover on his second constitutional claim. The court will not speculate, however, on who *might* be responsible when it is clear that Morrow and Childress *are* responsible on the basis of plaintiff's first constitutional claim.

For the reasons set forth above, IT IS THEREFORE ORDERED that:

1. The pendent state law claims are DISMISSED without prejudice.

2. Summary judgment for plaintiff Thomas S. is ALLOWED to the extent set forth above.

3. Counsel for plaintiff and defendants Morrow and Childress shall confer and attempt to propose, within ten (10) days, a judgment which includes a treatment program for Thomas S. based on "professional judgment" consistent with this order. Counsel should inform the court within that time frame whether they are able to reach an agreement.

4. The claims against defendants Benjamin Carpenter, Melton, Gaston, Beam, Hollifield, Forrester, Dean Carpenter, Heavner, and McAteer are DISMISSED without prejudice.

5. The court defers judgment on the issues of

(a) intervention of other plaintiffs,
(b) amendment of plaintiff's complaint, and
(c) certification of a class action

This 17 day of September, 1984.

James B. McMillan
United States District Judge

APPENDIX E

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division
C-C-82-418-M

THOMAS S., by his next friend, Paul Caldwell,

Plaintiff,

-vs-

SARAH MORROW, Secretary, North Carolina Department of Human Resources; ALLEN CHILDRESS, in his official capacity as guardian for the plaintiff; BENJAMIN CARPENTER, Director, Gaston County Department of Social Services; JAMES MELTON, Director, Gaston-Lincoln Area Mental Health Program; HARLEY B. GASTON, JR., DAVID BEAM, DAVID HOLLIFIELD, JAMES FORRESTER, DEAN CARPENTER, ROBERT HEAVNER, and PORTER McATEER, in their official capacity as Gaston County Commissioners,

Defendants.

FINAL JUDGMENT

On September 18, 1984, this court entered an order holding, *inter alia,* that plaintiff is entitled to summary judgment for prospective injunctive relief against defendants Morrow and Childress. There being no genuine issues of material fact, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiff Thomas S. is entitled to summary judgment as a matter of law.

Defendants are not required by this judgment to expend their own personal funds or resources.

Defendants are ORDERED to provide relief as follows:

1. A treatment plan to be developed within fourteen (14) days of entry of this judgment. The plan will contain specific behaviorally stated goals, objectives, plans, and time periods for meeting those goals and shall identify the staff involved with each objective. Copies of this written plan shall be filed with the court and with all counsel of record.

2. Defendants Morrow and Childress shall furnish plaintiff with the following treatment, based upon recommendations formulated by qualified professionals who are familiar with his treatment needs and acting within their respective areas of expertise relevant to the issue being considered. Treatment under the terms of this judgment may be provided by community service providers or through local government agencies.

> (a) Within thirty (30) days of the entry of this judgment, defendants Childress and Morrow shall agree upon and appoint a suitable case manager for Thomas S. This case manager will

have adequate time to meet the case management needs of Thomas S. He or she shall have responsibility for helping design the treatment plan; make the final selection of the residential placement, after consultation with plaintiff's guardian; train, monitor, and consult with care providers; arrange, assist with, and monitor his daily activities, educational, vocational, and his counseling placements; and decide when, within the limits specified in paragraph 2(c), those non-residential placements should begin. Defendant Morrow shall take reasonable measures to provide continuity and effectiveness of case manager services.

(b) As soon as possible, defendants shall locate a stable suitable supervised community residential placement such as: (1) a non-institutional specialized adult foster care situation which would allow Thomas S. to function as a family member with supervision but with few restrictions or (2) a group home with adults of average intelligence without severe emotional difficulties. The particular type of community residential placement chosen would be consistent with professional judgment and plaintiff's needs. It is recognized by professionals that the client's attitude toward a placement is crucial to its success in promoting minimal habilitation. Defendants shall arrange for suitable respite opportunity for Thomas S. as needed. Thomas S.'s residential placement is to be in an environment that will assure an appropriate balance between supervision and freedom. His treatment shall be geared toward an eventual short-term goal of supervised apartment living and toward eventual graduation to independent living. If qualified professionals with expertise in

providing the type of residential service to be delivered think that a back-up placement of the same type is appropriate, the back-up shall be afforded soon after the principal residential placement begins.

(c) The following nonresidential services shall be provided within thirty (30) days from the date of this judgment (provided that a placement may be delayed if justified by Thomas S.'s needs rather than an unavailability of services):

i. Immediately, plaintiff shall be given opportunities for exposure to social situations outside his placement, such as shopping trips, dining out, and other opportunities for community interaction on a frequent and regular basis.

ii. Within thirty (30) days plaintiff shall be offered appropriate mental health counseling and, in particular, appropriate counseling regarding his conflicts in establishing relationships with both men and women.

iii. Within sixty (60) days Thomas S. shall be offered appropriate vocational training to prepare him for a trade consistent with his needs and interests. If appropriate, the vocational training should be on-the-job training.

iv. Within six (6) months, Thomas S. should be offered appropriate adult basic educational opportunities. The educational setting and format shall be geared to Thomas S.'s individual needs and abilities.

3. Periodic evaluations of Thomas S. shall be conducted by the Division of Disorders of Development and Learning at the University of North Carolina at Chapel Hill to generate recommendations for his continuing treatment. If there is a change in the needs of Thomas S. or other circumstances warranting modification of this judgment, the parties shall confer and attempt in good faith to propose a modified judgment consistent with the changed treatment needs or other circumstances. Plaintiff's attorneys and agents shall be granted ready access to client records and other information concerning Thomas S.'s treatment needs. In fulfilling their monitoring functions, plaintiff's attorneys shall advise this court as to whether the terms of this judgment are being carried out and whether the treatment of Thomas S. otherwise reflects the exercise of accepted professional judgment.

4. Thomas S.'s treatment needs shall be formally re-evaluated by defendants at least every six (6) months following the date of the development of the treatment plan.

5. The treatment of Thomas S. shall be provided in a manner which promotes the independence and enhances the dignity of Thomas S. and is as consistent as possible with societal norms, in view of Thomas S.'s special needs.

6. Defendants and local community service providers who shall furnish Thomas S. with treatment under this judgment shall be guided by the decisions and opinions of qualified professionals involved with his treatment and acting within their respective areas of expertise in making the particular decisions at issue. Thomas S. shall be afforded minimally adequate treatment consistent with professional judgment designed to address his needs.

7. The guardian shall exercise his duties and responsibilities to the full extent required by N.C.G.S. § 35-1.34, and in a manner not inconsistent with this judgment. The guardian is not personally responsible for providing funds or resources for the care and treatment of Thomas S.

8. This judgment shall be binding upon defendants and their successors in office, their agents, and those to whom they have assigned or may assign any duties or responsibilities for the care and treatment of Thomas S.

This 7 day of December, 1984.

James B. McMillan
United States District Judge

Article 1A.

Guardianship of Incompetent Adults.

Part 1. Legislative Purpose.

§ 35-1.6. Legislative purpose.

The General Assembly of North Carolina recognizes that:

(1) Some incompetent adults, regardless of where they are living, require the assistance of a guardian in order to help them exercise their rights, including the management of their property and personal affairs.

(2) Those individuals not able to act effectively on their own behalf have a right to a responsible, impartial guardian.

(3) The essential purpose of guardianship is to replace an individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions.

(4) Limiting the rights of the individual by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights.

(5) Guardianship should seek to preserve for the incompetent individual the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his capabilities, an incompetent individual should be permitted to participate as fully as possible in all decisions that will affect him. (1977, c. 725, s. 1.)

Cross References. — For provisions relating to guardians and wards, see § 33-1 et seq. As to social services officials and employees as public guardians, see § 108A-15. As to mental health officials and employees as public guardians, see § 122-24.1.

Editor's Note. —Session Laws 1977, c. 725, s. 8, provides: "This act shall become effective on March 1, 1978, and shall apply only to appointments made on or after that date."

Legal Periodicals. — For a survey of 1977 law on health care regulation, see 56 N.C.L. Rev. 857 (1978).

§ 35-1.7. Definitions.

When used in this Article:

(1) The term "accounting" refers to the financial or status reports filed with the clerk, designated agency, respondent, or other person or party with whom such reports are required to be filed.

(2) The term "clerk" means the clerk of the superior court of the county in which proceedings under this Article are brought or filed.

(3) The term "designated agency" means the State or local human resources agency designated by the clerk in his order to prepare, cause to be prepared, or assemble the multidisciplinary evaluation and to receive, comment upon, and certify receipt of a financial or status report or to perform other functions as the clerk may order. A designated agency includes, without limitation, State, local, regional or area mental health, mental retardation, vocational rehabilitation, public health, diagnostic evaluation centers, social service, and developmental disabilities agencies.

(4) The term "disinterested public agent" means an adult officer, agent, or employee of a State human resources agency who has no immediate responsibilities for providing services to a ward or the director or assistant directors of a local human resources agency. The fact that a disinterested public agent is employed by a State or local human resources agency that provides financial assistance to a ward does not disqualify that person from being appointed a guardian.

(5) The term "department" means the Department of Human Resources, unless the context requires otherwise.

(6) The term "financial report" means the report filed by the guardian concerning all financial transactions, including receipts and expenditures of money of the ward, sale of the ward's property, or other transactions involving the ward's property.

(7) The term "general guardian" means a guardian of both the estate and the person.

(8) The term "guardian ad litem" means a guardian appointed pursuant to G.S. 1A-1, Rules of Civil Procedure, Rule 17(b) and (c).

(9) The term "guardian of the estate" means a guardian appointed solely for the purpose of managing the property, estate, or business affairs of a ward.

(10) The term "guardian of the person" means a legal guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward.

(11) The term "incompetent adult" means an adult who lacks sufficient capacity to make or communicate important decisions concerning his person, family, or property because of mental illness, mental retardation, epilepsy, cerebral palsy, or autism.

The term "incompetent child" means a minor who, other than by reason of his minority, is impaired to the extent

that he lacks sufficient capacity to make or communicate important decisions concerning his person, family, or property because of mental illness, mental retardation, epilepsy, cerebral palsy, or autism.

(12) The term "important decisions concerning his person, family, or property" means decisions by a ward concerning the furnishing of the necessities of life, including without limitation food, shelter, clothing, and medical care, for himself and his family, if any.

(13) The term "indigent" refers to a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action brought under this Article.

(14) The term "interested person" means any individual who has an interest or stake in the personal well-being or in the estate, property, or business affairs of a ward.

(15) The term "interim guardian" means a guardian appointed under the provisions of G.S. 35-1.15.

(16) The terms "legal guardian" or "guardian" mean the guardian appointed by the clerk.

(17) The term "mental health professional" has the same meaning as set out in G.S. 122-36(h).

(18) The term "mental retardation professional" has the same meaning as set out in G.S. 122-36(i).

(19) The term "multidisciplinary evaluation" means an evaluation of the respondent that is required to contain current medical, psychological, and social work evaluations and that may contain current evaluations by professionals in other disciplines, including without limitation education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, and communications-disorders. The evaluations are current if made not more than one year from the date on which a petition for guardianship is filed. The evaluation shall set forth the nature and extent of the ward's disability, and recommend a guardianship plan and program.

(20) The term "person in loco parentis" means a person, other than a parent or legal, interim, or successor guardian, who has assumed the responsibility for the care, custody, and control of the ward. It includes, without limitation, foster parents, other persons having temporary or permanent care, custody, and control, and State or local government departments of social services or the Department or any of its divisions having such care, custody, and control.

(21) The term "physician" means a medical doctor who is duly licensed by this State to practice medicine.

(22) The term "psychologist" means a person who is duly licensed by this State as a psychologist or is employed as a psychologist by the Department of Human Resources or any State or local agency under the Department's supervision, operation or control.

(23) The term "treatment facility" means the same as the term "treatment facility" means under the provisions of G.S. 122-36(g) and G.S. 122-56.2(b), and it includes group homes, halfway houses and other community-based residential facilities for impaired adults.

(24) The term "status report" means the report required by G.S. 35-1.31 to be filed by the guardian of the ward. A status report shall include a report of a recent medical and dental examination of the ward by one or more physicians or dentists, a report on the legal guardian's performance of his duties as set forth by this Article and in the order of the clerk authorizing the appointment of a legal guardian, and a report on the ward's condition, needs, and development. It also may contain, without limitation, reports of mental health or mental retardation professionals, psychologists, social workers, persons in loco parentis, a member of a multidisciplinary evaluation team, a designated agency, a disinterested public agent or agency, a guardian ad litem, a guardian of the estate, an interim guardian, a successor guardian, an officer, official, employee or agent of the Department, or any other interested person, including reports from group home parents or supervisors if the ward lives in a group home, a report from an employer if the ward is employed in competitive employment, a sheltered workshop, a work activities center or in any other working capacity, and a report of a member of the staff of a treatment facility if the ward is a resident patient of one or an outpatient client of one.

(25) The term "testamentary guardian" means a guardian appointed by the last will and testament of a parent of a ward.

(26) The term "ward" means the adult person for whom a guardian has been appointed or is sought to be appointed.

(27) The term "autism" refers to a person who has a physical disorder of the brain that includes disturbance in the developmental rate of physical, social, and language skills, abnormal responses to sensations, absence or delay in speech or language, or abnormal ways of relating to people, objects, and events, and that occurs sometimes by itself and sometimes in connection with other brain-functioning disorders. Autism is (a) a syndrome consisting of withdrawal, very inadequate social relationships, exceptional object relationships, language disturbances, and monotonously repetitive motor behavior; many children with autism will also be seriously impaired in general intellectual functioning; and (b) mental illness observed in young children characterized by severe withdrawal and inappropriate response to external stimulation.

(28) The term "cerebral palsy" refers to a person who has a muscle dysfunction, characterized by impairment of movement, often combined with speech impairment, and caused by abnormality of, or damage to, the brain. Cerebral palsy is a disorder dating from birth or early infancy, nonprogressive, characterized by examples of aberrations of motor function (paralysis, weakness, or incoordination) and often other manifestations of organic brain damage such as sensory disorders, seizures, mental retardation, learning difficulty, and behavioral disorders.

(29) The term "epilepsy" refers to a person who is subject to convulsive attacks and during these attacks usually loses consciousness or is subject to convulsive seizures. Epilepsy

is a clinical disorder characterized by single or recurring attacks of loss of consciousness, convulsive movements, or disturbances of feeling or behavior. These transient episodes are associated with excessive neuronal discharges occurring diffusely or focally in the brain. The sites of neuronal discharge determine the clinical manifestations of the seizure.

(30) The term "mental illness" refers to a person who has an illness that so lessens the capacity of the person to use self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control.

(31) The term "mental retardation" refers to a person who has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. (1977, c. 725, s. 1; 1979, c. 751, s. 1.)

Legal Periodicals. — For article on the continuing power of attorney, see 5 Camp. L. Rev. 305 (1983).

Part 3. Jurisdiction and Venue.

§ 35-1.8. Jurisdiction and venue; exclusive procedure.

(a) The clerks of superior court have original jurisdiction of proceedings brought or filed under this Article. Venue for such proceedings is in the county where the respondent resides, where he has real property, where either or both of his parents or next of kin reside, or where he is present, or if the respondent is an inpatient or resident of a treatment facility, venue is also in the county in which he resided when admitted to the facility.

(b) This Article establishes the exclusive procedure for adjudicating the following adults to be incompetent, appointing guardians for them, and adjudicating the restoration of their competency: mentally retarded, epileptic, cerebral palsied or autistic persons. This Article also establishes an alternative procedure, in addition to those established by General Statutes Chapter 35, Article 2, for adjudicating mentally ill persons to be incompetent and for appointing guardians for them. If a petition for adjudication of incompetency has been filed against the respondent, alleging him to be mentally ill, under the provisions of Chapter 35, Article 2 and the petition has been dismissed after a hearing on the merits, the clerk on his own motion may dismiss a petition filed under this Article

against the same person, alleging him to be mentally ill, unless the petition alleges substantially new facts, not previously alleged in the Article 2 proceeding, tending to prove he is an incompetent adult, as defined in this Article, because of mental illness.

This Article does not apply to persons who are senile or have senile dementia unless they also are mentally ill, mentally retarded, epileptic, cerebral palsied, or autistic adults. (1977, c. 725, s. 1; 1979, c. 751, ss. 2, 3.)

§ 35-1.9. Change of venue.

Upon a petition of any of the parties or any interested person and upon a finding by the clerk before whom a proceeding under this Article was originally filed that, from all the facts and circumstances of the case, no hardship or prejudice will result to the respondent from a change of venue and that a change of venue will be convenient for all parties, or that the clerk is not disinterested in the proceedings, the clerk may order a change of venue. (1977, c. 725, s. 1; 1979, c. 751, s. 31.)

Part 4. Proceedings before Clerk.

§ 35-1.10. Petition before clerk.

Any person may file a verified petition for the adjudication of incompetence of any adult person by filing the same with the clerk. (1977, c. 725, s. 1; 1979, c. 751, s. 4.)

§ 35-1.11. Costs in action.

Costs shall be assessed as in special proceedings and shall be taxed against the respondent unless in the clerk's opinion the petitioner did not have reasonable grounds to bring the proceedings, in which case they shall be taxed to the petitioner. If the respondent is indigent, the costs shall be borne by the Administrative Office of the Courts. (1977, c. 725, s. 1; 1979, c. 751, s. 5.)

§ 35-1.12. Contents of petition.

The petition shall set forth, to the extent known:

(1) The name, age, address, and county of residence of the respondent;

(2) The name, address, and county of residence of the petitioner, and his interest in the action;

(3) A general statement of the respondent's property, or that the respondent is indigent, with an estimate of the value of any property, including any compensation, insurance, pension, or allowance to which he is entitled;

(4) A statement of the reason or reasons why the adjudication of incompetence is sought;

(5) The name, address, and county of residence of the respondent's spouse, or, if none, adult children or next of kin, or, if none, person or persons acting in loco parentis;
(6) Repealed by Session Laws 1979, c. 751, s. 6, effective January 1, 1980. (1977, c. 725, s. 1; 1979, c. 751, ss. 6, 31.)

§ 35-1.13. Service of petition.

A copy of the petition and the written notice of the time, date, and place set for a hearing on the petition shall be served on the respondent and on his guardian ad litem or counsel appointed by the clerk, if any. The petitioner shall mail, by first-class mail, a copy of the petition and the written notice to the person or persons designated in G.S. 35-1.12(5). The clerk, on his own motion, may order notice to be served on any other person pursuant to Rule 4 or the

clerk may mail, by first-class mail, a copy of the petition and the written notice to any other person. The sheriff shall serve notice on the designated persons without demanding his fees in advance. Service shall be made as provided by G.S. 1A-1, Rules of Civil Procedure, Rule 4. (1977, c. 725, s. 1; 1979, c. 751, s. 7.)

§ 35-1.14. Subsequent service.

Unless otherwise provided, all subsequent notices to the parties shall be served as provided by G.S. 1A-1, Rules of Civil Procedure, Rule 5. (1977, c. 725, s. 1; 1979, c. 751, s. 8.)

§ 35-1.15. Appointment of interim guardian.

(a) The petitioner or the person or persons designated in G.S. 35-1.12(5) may also file a verified petition with the clerk for the appointment of an interim guardian.
(b) The petition shall set forth facts tending to show that there is reasonable cause to believe that the respondent is an incompetent adult and that he is in a condition that, unless appropriate intervention is provided by way of the appointment of a guardian to consent on the respondent's behalf to intervention, constitutes or reasonably appears to constitute an imminent or foreseeable danger to his physical well-being.
(c) Immediately upon receiving the petition for the appointment of an interim guardian, the clerk shall appoint counsel or guardian ad litem to represent the respondent if the petition alleges the ward is indigent. If the petition does not allege that the respondent is indigent, the clerk nevertheless may appoint counsel or a guardian ad litem to represent him, in which case the fees of the court-appointed counsel or guardian ad litem shall be a proper charge against the respondent. The clerk shall also immediately set a time, date, and place for a hearing on the petition. The petition and the order appointing counsel or guardian ad litem and setting the

time, date, and place for the hearing shall be promptly served on the respondent and on his counsel or guardian ad litem, if any. The hearing shall be set for a date no later than 15 days after the petition has been served on the respondent. The hearing may be held earlier and in all cases shall be held as early as possible after the petition is filed.

(d) If at the hearing the clerk finds that there is reasonable cause to believe that the respondent is an incompetent adult and that he is in a condition that, unless appropriate intervention is provided by way of the appointment of an interim guardian to consent on the respondent's behalf to intervention, constitutes or reasonably appears to constitute an imminent or foreseeable danger to his physical well-being, he shall immediately appoint an interim guardian, make specific findings of fact to support his conclusions, and set forth the guardian's powers and duties. The powers and duties of the interim guardian shall extend only so far as necessary to meet the emergency and in any event not more than 45 days, but the clerk may for good cause shown extend the period of interim guardianship for another 45 days. The interim guardian shall be a guardian of the person and not of the estate of the ward. The interim guardian shall not be required to post a bond. No multidisciplinary evaluation shall be ordered in any proceedings for the appointment of an interim guardian.

(e) The petitioner seeking an interim guardianship must also simultaneously file a petition under G.S. 35-1.10 for the adjudication of incompetence and may voluntarily dismiss the petition for adjudication of incompetence and for interim guardianship only before the hearing on the petition for interim guardianship.

(f) After entering his order on the petition for adjudication of incompetency, the clerk shall dismiss the petition for interim guardianship.

(g) The guardian ad litem appointed to represent the respondent in a petition for interim guardianship may waive his right to notice under G.S. 1A-1, Rules of Civil Procedure, Rule 17. (1977, c. 725, s. 1; 1979, c. 751, ss. 9-13, 31.)

§ 35-1.16. Rights to counsel, evaluation, and jury; hearing on petition.

(a) Right to Counsel. — The respondent is entitled to be represented by counsel of his own choice or by court-appointed counsel or guardian ad litem.

If the petition filed under G.S. 35-1.10 alleges that the respondent is indigent, and no counsel or guardian ad litem has been appointed under G.S. 35-1.15, the clerk shall immediately appoint counsel to represent him or if it is not alleged that the respondent is indigent and he fails to employ counsel before the hearing, the clerk shall immediately appoint counsel or guardian ad litem to represent him.

If the respondent for whom counsel has been appointed seeks to waive the right to counsel and if the clerk determines at the hearing on the petition that he lacks capacity to waive the right to counsel but does not want counsel, the clerk shall appoint a guardian ad litem, pursuant to G.S. 1A-1, Rules of Civil Procedure, Rule 17.

The fees of court-appointed counsel and guardians ad litem shall be borne by the Administrative Office of the Courts unless the clerk finds that the respondent is incompetent and not indigent, in which case the fees of court-appointed counsel or guardian ad litem shall be a proper charge against the respondent.

(b) Right to Multidisciplinary Evaluation. — The clerk, the respondent, his counsel or the guardian ad litem, or the petitioner may require a multidisciplinary evaluation of the ward to be performed and filed in the proceedings. If no such evaluation is requested, none shall be performed. Upon a motion of the respondent or on his own motion, the clerk may for good cause deny the petitioner's request for a multidisciplinary evaluation.

The request by the petitioner, respondent, or his counsel or guardian ad litem for a multidisciplinary evaluation shall be made in writing filed with the clerk. They shall make their request within 10 days after the petition is filed, or after counsel has filed his appearance or the guardian ad litem has been appointed, whichever is later.

If a multidisciplinary evaluation is requested, the clerk shall name a designated agency and order it to prepare or cause to be prepared or to assemble a current multidisciplinary evaluation of the respondent. The agency shall file the report of the evaluation with the clerk and shall send copies to the petitioner and the respondent not later than 30 days after the agency receives the order of the clerk. The clerk may order an extension of the 30-day period upon good cause shown by the agency.

Upon receipt of the report of the multidisciplinary evaluation, the clerk shall set a time, date, and place for a hearing to determine whether the respondent is incompetent and shall notify all interested parties of the time, date, and place for the hearing.

The cost of the multidisciplinary evaluation shall be borne by the respondent unless he is indigent, in which case it shall be borne by the Department.

The respondent may obtain other evaluations at his own expense. If the clerk finds that the respondent is indigent and if the respondent requests that he be evaluated by other mental health or mental retardation professionals, the clerk, upon good cause shown, may order that the respondent be so evaluated. The cost of those evaluations shall be borne by the Department.

The report of the multidisciplinary evaluation and other evidence, if any, shall be considered at the hearing held by the clerk.

If no multidisciplinary evaluation has been requested, the clerk shall proceed with the hearing as set out in the original notice of hearing issued by him pursuant to G.S. 35-1.13.

The hearing shall be held no earlier than seven and no later than 30 days after notice of the hearing is served and not before the clerk receives the multidisciplinary evaluation, if any.

Upon disposition of the proceedings before the clerk or any appeal, the clerk shall send all copies of the multidisciplinary evaluation to the designated public agency, which shall file them among its records on the ward.

If a multidisciplinary evaluation does not contain medical, psychological, or social work evaluations, the designated agency nevertheless shall file it with the clerk and send copies to the petitioner and respondent and, in its report or in a transmittal letter, explain why the evaluation does not contain medical, psychological, or social work evaluations.

The clerk may not issue an order requiring that the respondent be taken into custody for the purpose of being evaluated.

(c) Right to Jury Trial. — At the hearing, the respondent has a right, upon request by him, his counsel, or the guardian ad litem, to trial by jury. The respondent, his counsel, or the guardian ad litem may waive the right to trial by jury by written notice filed with the clerk. If none of them request trial by jury, the clerk may nevertheless require trial by jury under G.S. Chapter 1A, Rules of Civil Procedure, Rule 39(b) by entering an order for trial by jury on his own motion. The jury shall be composed of 12 persons chosen from the jury list of the county in accordance with the provisions of Chapter 9 of the General Statutes.

(d) Open Hearings. — The hearing shall be open to the public unless the respondent, his counsel, or the guardian ad litem requests otherwise. The record of the hearing, including without limitation any documentary testimony introduced at the hearing and the report of the multidisciplinary evaluation, shall be open to the public unless, for good cause shown, the clerk, upon petition of the respondent, his counsel, or the guardian ad litem, orders otherwise.

(e) Right to Present Evidence. – The petitioner and the respondent are entitled to present oral testimony or documentary evidence at the hearing, subpoena witnesses and the production of documents, and examine and cross-examine witnesses.

(f) Clerk's Finding. — If the clerk or jury shall find by the greater weight of the evidence that the respondent is an incompetent adult,

the clerk shall appoint a guardian pursuant to G.S. 35-1.17. If the clerk or jury does not so find, the clerk shall dismiss the petition.

(g) Clerk's Order. — After considering all the evidence and having found the respondent is an incompetent adult, the clerk may enter an order setting forth:

(1) Findings on the nature and extent of the ward's incompetency;

(2) The powers and duties of the guardian or guardians regarding the person or the estate of the ward, or both; such powers and duties shall include, unless the clerk provides to the contrary, the powers and duties of guardians with respect to the person, as provided under G.S. 35-1.34, and

with respect to the estate, as provided under G.S. 35-1.35. The clerk may order that the ward retains certain legal rights and privileges to which he was entitled before he was adjudged incompetent; and

(3) Whether there shall be one or more guardians, his or their identity, and, if more than one, who shall be guardian of the person and who shall be guardian or guardians of the estate. (1977, c. 725, s. 1; 1979, c. 751, ss. 14-17, 31; 1981, c. 492.)

Editor's Note. — Session Laws 1981, c. 492, which substituted "no earlier than seven and no later than 30" for "not less than 10" in the ninth paragraph of subsection (b) and deleted "the" preceding "notice" in that paragraph, provides, in s. 2, that the act is applicable to hearings petitioned for on or after June 2, 1981.

§ 35-1.17. Hearing before clerk on appointment of guardian.

For the purposes of determining who the guardian or guardians shall be, the clerk shall receive whatever testimony is offered at the conclusion of the adjudication of incompetency proceeding. For good cause shown, the clerk may transfer the appointment of a guardian and the guardianship to any county identified in G.S. 35-1.8. Upon transfer, the transferring clerk shall enter a written order authorizing the same. The order shall further state the appropriate person to be appointed guardian as determined at the aforesaid hearing. This order along with a certified copy of the adjudication papers shall be sent to the clerk of the transferee county and set up in the estates division as a basis for the guardian's application, appointment, and qualification. (1977, c. 725, s. 1; 1979, c. 751, s. 18.)

§ 35-1.18. Clerk to issue letters of appointment.

The clerk shall issue to the guardian or guardians letters of appointment signed by him and sealed with his seal of office. In all cases, the clerk shall specify in his order whether the guardian, or if there is more than one guardian, which of the guardians, shall be entitled to and have control of the ward's estate. (1977, c. 725, s. 1.)

§ 35-1.19. Bond.

The Secretary of the Department of Human Resources shall require, or purchase, in such amounts as he deems adequate and proper, individual or blanket bonds for all disinterested public agents appointed to be guardians, as provided by G.S. 35 1.28(d), and whether they serve as guardians of the estate, of the person, or of both, or one blanket bond covering all such agents, such bond or bonds to be conditioned upon faithful performance of their duties as guardians and made payable to the State. The premiums shall be paid by the State.

In all cases in which the clerk appoints a general guardian or a guardian of the estate, the clerk shall require the guardian to post a bond as provided by Chapter 33, Article 2. The clerk shall not require a guardian of the person to post a bond. (1977, c. 725, s. 1; 1979, c. 751, s. 19.)

§ 35-1.20. Appeals from clerk's orders.

Appeals from the clerk shall be to the superior court de novo and thence to the Court of Appeals. An appeal does not stay the appointment of a guardian unless so ordered by the superior court or the Court of Appeals. The Court of Appeals may request the Attorney General to represent the petitioner on appeal. (1977, c. 725, s. 1.)

CASE NOTES

Trial De Novo Relates Only to Adjudication of Incompetency. — While this section states that appeals to the superior court from orders of the clerk shall be de novo and thence to the Court of Appeals, this section must be read in pari materia with the remaining sections of the Article and when so read, the right of a trial de novo on appeal from the orders of the clerk relates only to the adjudication of incompetency. In re Bidstrup, 55 N.C. App. 394, 285 S.E.2d 304 (1982).

Burden on Appeal. — For a litigant to succeed in reversing the decision of a clerk's appointment of a guardian on the grounds that the issuance of such judgment constituted an abuse of discretion, the litigant must show that the challenged action is manifestly unsupported by reason. In re Bidstrup, 55 N.C. App. 394, 285 S.E.2d 304 (1982).

§§ 35-1.21 to 35-1.27: Reserved for future codification purposes.

Part 5. Qualifications, Priorities, Duties, and Liabilities of Guardians.

§ 35-1.28. Qualifications of guardians.

(a) The clerk may appoint as guardian an individual, a domestic corporation, or a disinterested public agent. The person filing the petition may submit to the clerk a name or names of potential guardians.

(b) An individual to be appointed as a guardian shall be a resident of the State of North Carolina.

(c) A corporation that serves as a guardian shall be authorized by its charter to serve as a guardian or in similar fiduciary capacities.

(d) A disinterested public agent who is appointed by the clerk to serve as a guardian is authorized and required to do so. When the person ceases to qualify as a disinterested public agent, the clerk shall appoint a successor guardian. No public agent shall be appointed guardian until exhaustive efforts have been made to find individuals or corporations to be guardians. (1977, c. 725, s. 1.)

CASE NOTES

Cited in In re Bidstrup, 55 N.C. App. 394, 285 S.E.2d 304 (1982).

§ 35-1.29. Priorities for appointment.

The clerk shall consider appointing a guardian according to the following order of priority: an individual; a corporation; or a disinterested public agent. (1977, c. 725, s. 1.)

CASE NOTES

Cited in In re Bidstrup, 55 N.C. App. 394, 285 S.E.2d 304 (1982).

§ 35-1.30. Rule-making power of Secretary of Human Resources.

The Secretary of the Department of Human Resources has the authority to issue rules and regulations for the implementation of the guardianship responsibilities of disinterested public agents who are appointed guardians. The rules and regulations shall provide, among other things, that disinterested public agents shall undertake or have received training concerning the powers and responsibilities of guardians. They shall also set forth uniform statewide accounting procedures for disinterested public agents appointed guardians. (1977, c. 725, s. 1.)

§ 35-1.31. Status reports.

(a) Within six months after he is appointed, the general guardian or guardian of the person shall file an initial status report with the designated agency, if an agency has been appointed. The general guardian or guardian of the person shall file his second status report with the designated agency one year after he is appointed, and he shall file all subsequent reports with the designated agency annually thereafter.

(b) The general guardian or guardian of the person shall file each status report under his oath or affirmation that the report is complete and accurate so far as he is informed and can determine.

(c) The designated agency shall not make the status reports available to anyone other than the guardian, the ward, or State or local human resource agencies providing services to the ward. (1977, c. 725, s. 1; 1979, c. 751, s. 20.)

§ 35-1.32. Duties of designated agency.

(a) Within 30 days after it receives a status report, the designated agency shall certify to the clerk that it has reviewed the report and shall mail a copy of its certification to the guardian.

(b) At the same time, it may

(1) Send its written comments on the report to the clerk, the guardian, or any other person who may have an interest in the ward's welfare;

(2) Notify the guardian that it is able to help the guardian in the performance of his duties;

(3) Petition the clerk for an order requiring the guardian to perform the duties imposed on him by the clerk or this Article if it appears that the guardian is not performing those duties;

(4) Petition the clerk for an order modifying the terms of the guardianship or the guardianship program or plan if it appears that such should be modified;

(5) Petition the clerk for an order removing the guardian from his duties and appointing a successor guardian if it appears that the guardian should be removed for cause;

(6) Petition the clerk for an adjudication of restoration to competency pursuant to G.S. 35-1.39; or

(7) Petition the clerk for any other appropriate orders.

(c) If the designated agency files such a petition, it shall cause the petition to be signed and acknowledged by the officer, official, employee, or agent who has personal knowledge of the facts set forth in the petition, and it shall set forth all facts known to it that tend to support the relief sought by the petition.

(d) The clerk shall take action upon the petition pursuant to the provisions of G.S. 35-1.37, 35-1.38, and 35-1.39. (1977, c. 725, s. 1; 1979, c. 751, ss. 21, 22.)

§ 35-1.33. Procedure to compel status reports.

The procedures for compelling the guardian to file status reports is the same as set forth in G.S. 35-1.35 with respect to compelling the guardian to file financial reports. (1977, c. 725, s. 1.)

§ 35-1.34. General powers and duties of guardians with respect to the person.

(a) A guardian of the person or general guardian has the following powers and duties:

(1) To the extent that it is not inconsistent with the terms of any order by a court of competent jurisdiction relating to the admission, detention, or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of domicile within or without this State. In arranging for a place of domicile, the guardian shall give preference to places within this State over places not within this State if both in- and out-of-state places are substantially equivalent. He also shall give preference to places that are not treatment facilities; if the only available and appropriate places of domicile are treatment facilities, he shall give preference to community-based treatment

facilities, such as group homes or nursing homes, over treatment facilities that are not community-based, such as residential hospitals for the mentally ill as established and provided for by Article 1 of Chapter 122 or residential centers for the mentally retarded as established and provided for by Article 9 of Chapter 122.

(2) He shall make provision for the care, comfort, and maintenance of his ward and shall arrange for his training, education, employment, and rehabilitation or habilitation. He shall take reasonable care of his ward's personal property.

(3) He may commence and defend against any judicial action in the ward's name.

(4) He may give any consent or approval that may be necessary to enable the ward to receive medical, legal, psychological, or other professional care, counsel, treatment, or service.

He also may give any other consent or approval that may be required or desirable. He may petition the clerk for the clerk's concurrence in the consent or approval. He may not, however, consent to the sterilization of a mentally ill or mentally retarded ward, which sterilization may be performed legally only after compliance with Chapter 35, Article 7.

(b) A guardian of the person is entitled to be reimbursed out of the ward's estate for expenditures incurred in the performance of his duties.

(c) The guardian of the person and a general guardian shall not be liable, by reason of his authorizing or giving any consent or approval necessary to enable the ward to receive legal, psychological, or other professional care, counsel, treatment, or service or other consent or approval that may be required or desirable, for damages to the ward or his estate resulting from the negligence or other acts of a third person if the guardian has acted within the limits imposed on him by this Article or the clerk or both. A guardian of the person and a general guardian shall not be liable for damages to the ward or his estate by reason of authorizing medical treatment or surgery for his ward if the guardian acted after consulting with the ward's physician, acted in good faith, was not negligent, and acted within the limits imposed on him by this Article or the clerk or both. (1977, c. 725, s. 1; 1979, c. 751, s. 23.)

§ 35-1.35. Powers and duties of guardians with respect to the estate.

A general guardian and a guardian of the estate shall have all the powers and duties under Articles 2, 3, 4, 5, 5A, 5B, and 5C of Chapter 35 of the General Statutes and by Articles 2, 3, 4, and 5 of Chapter 33 of the General Statutes unless the provisions of this Chapter are inconsistent therewith, in which case the provisions of this Chapter shall prevail, or unless the provisions of the order of the clerk appointing a guardian are inconsistent therewith, in which case the provisions of the clerk's order shall prevail. A general guardian or a guardian of the estate shall file his inventories, accounts, and financial reports with the clerk who appointed him at the times and in the manner required by G.S. 33-36, G.S. 33-39, and G.S. 33-41, and the clerk shall file those reports in the appropriate estate file. (1977, c. 725, s. 1; 1979, c. 751, s. 24.)

Appendix C.1

[C-31]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

THOMAS S., by his next friend, PAUL CALDWELL,	)	
Plaintiff.	)	
vs.	)	AMENDED COMPLAINT
SARAH T. MORROW, et al.,	)	
Defendants.	)	

. . . .

[C-33]

7. Defendant Allen Childress is a citizen and resident of Burke County, North Carolina. He is the legal guardian of Thomas' person and estate, and he was appointed guardian under the authority of N.C.G.S. Section 122-24.1 and Section 35-1.28 in his official capacity as Regional Adult Mental Health Specialist of the DHR Division of Mental Health, Mental Retardation, and Substance Abuse Services.

He is therefore

[C-34]

sued in his official capacity as Thomas' quardian.

. . . .

[C-37]

16. At the same time, DSS officials initiated an incompetency and guardianship proceeding pursuant to Chapter 35, Article 1A of the North Carolina General Statutes. Thomas was ultimately adjudicated incompetent, and Allen Childress was appointed his guardian on February 4, 1982.

. . . .

Appendix C.2

[C-53]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

THOMAS S., by his next friend, PAUL CALDWELL,	)	
Plaintiff.	)	AMENDED ANSWER OF DEFENDANTS MORROW AND CHILDRESS
vs.	)	

SARAH T. MORROW, et al.,)
)
Defendants.)
)

Defendants Sarah T. Morrow and Allen Childress, answering the amended complaint in their official capacities allege and say:

. . . .

[C-56]

10. Upon information and belief, Defendants admit that Thomas S. is a nineteen year old male who was placed

[C-57]

for adoption by his natural mother at birth. It is further admitted that according to treatment records in the custody of the Department of Human Resources, Thomas S. was in the custody of the Gaston County Department of Social Services from infancy until his eighteenth birthday.

. . . .

[C-58]

14. Defendants admit that Thomas S. reached the age of eighteen on May 31, 1981. Defendants lack information from which to form an opinion as to the truth or falsity of the remaining allegations contained in Paragraph 14 of the amended complaint, and the same are therefore denied.

. . . .

[D-279]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
FILE NO. C-C-82-0418-M

THOMAS S., by his next friend, PAUL CALDWELL, Plaintiff. vs. SARAH T. MORROW, et al., Defendants.	AFFIDAVIT OF DEFENDANT ALLEN CHILDRESS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Being duly deposed and sworn, the undersigned affiant states the following

facts:

1. I am R. Allen Childress, a resident of Burke County, North Carolina. I am giving this affidavit for the purpose of assisting the Court to view this case from the perspective of Thomas S.'s appointed guardian, and to show the existence of factual issues as to the responsibility for the care of Thomas S.

2. I am employed as the Regional Specialist for Adult Mental Health, for the Western North Carolina region. My supervisor is Bill Rafter, Western Regional Director for the Division of Mental Health, Mental Retardation and Substance Abuse Services of the Department of Human Resources. His supervisor is Dr. Gene Douglas, Director of the Division, and Dr. Douglas's supervisor is Dr. Sarah Morrow, Secretary of the Department.

3. My duties include serving as a liason between mental health and mental

retardation impatient institutions and mental health and mental retardation area programs. I do not administer any budget nor do I supervise any clinical personnel.

[D-280]

4. My guardianship was created in Gaston County in the case designated "In the Matter of Tom Shedd" 81 Sp 392. This case was commenced on June 4, 1981. On June 12, 1981 the Clerk named the North Carolina Memorial Hospital Psychiatric Unit in Chapel Hill as the "designated agency" to prepare a multidisciplinary evaluation of Thomas S. Thomas was adjudicated incompetent on January 28, 1982. The Court found that no individual or corporation was willing to serve as guardian, and so a "disinterested public agent" was appointed. See attached statute. [G.S. Section 35-1.7.]

5. That agent was Dr. R. J. Blackley, Director of the Division of Mental Health,

Mental Retardation and Substance Abuse Services in Raleigh, North Carolina. This is the position that Dr. Eugene Douglas now fills.

6. Within ten days, I was appointed as a substitute for Dr. Blackley, because my residence was closer to that of Tom. The order appointing me was dated February 4, 1982, and ordered the appointment of "Allen Childress, Regional Adult Mental Health Specialist, Department of Human Resources, Division of Mental Health, Mental Retardation and Substance Abuse Services, Black Mountain, North Carolina 28711, or whoever his successor to that position might be...".

7. Letters of guardianship were issued to me on February 22, 1982 by the Clerk of Superior Court for Burke County, to whom this case was forwarded by Gaston County for the sole purpose of issuing these letters.

8. The Clerk of Superior Court for Gaston County never named any "designated agency" for any purpose other than that of

[D-281]

performing the multidisciplinary evaluation. The term "designated agency" is defined at N.C.G.S. Section 35-1.7(3) and the duties of the designated agency are given at N.C.G.S. Section 35-1.32. (Copies attached)

9. In the Guardianship Act, the "designated agency" is given a continuing role as correspondent to the guardian throughout the ward's incompetency. But the order naming a "designated agency" in this guardianship specifies only the duty of giving the multidisciplinary exam. (Order is attached). There is no "designated agency" with a continuing role in this case.

10. I apparently had no choice but to serve as guardian in this case. My duty to

serve is imposed by statute as an incident to my employment with a public agency. See N.C.G.S. Section 35-1.28(d), attached.

11. My efforts on behalf of Tom commenced before my appointment on February 22, 1982 and such efforts continue through the present. These efforts have included Tom's placement at Broughton Hospital, continual contact with Tom at Broughton Hospital, coordination of his treatment at Broughton Hospital, continual contact with Tom following his discharge from Broughton Hospital and assistance in developing a program for community treatment of Tom following his discharge. I am currently involved in some as-yet unconcluded discussions with Gaston-Lincoln Mental Health Area Program and "PUSH Incorporated"

regarding the revision and implementation of the contract for community treatment which is embodied in the Consent Judgment

recently filed in this lawsuit.

12. My powers and duties as guardian of Tom are specified in N.C.G.S. Section 35-1.34. That statute specifies that the guardian "shall make provision for the care, comfort, and maintenance of his ward and shall arrange for his training, education, employment, and rehabilitation or habilitation." That statute does not say that the guardian shall make these arrangements "if the resources are available."

13. No resources are available to me as guardian especially for the care, comfort, and maintenance or for the training, education, employment, and rehabilitation or habilitation of Thomas S. The only resources which are available to me as guardian are those which are available generally to any person, whether or not that person has a guardian.

14. I have no authority to order that

anyone be treated or cared for at a state institution.

15. I have no authority to order that anyone be treated or cared for at an area program, at a Department of Social Services, or at any other program or institution. All such programs or institutions employ decision making processes for the allocation of their own resources and these decision making processes are not subject to control by a guardian.

16. I have no budget to spend as a guardian. The Administrative Office of the Courts will pay the legal expenses of a guardian ad litem. The Department of Human Resources

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will pay for the multi-disciplinary review.

But so far as I am aware, no one is obliged to pay for the care and treatment

of my ward, no matter how well represented he may be by his guardian ad litem, and no matter how badly he is determined by his multidisciplinary evaluation to be in need of care and treatment.

17. At present there are no guidelines to assist a public guardian in the performance of his duties. Proposed rules were forwarded by the staff of the Department of Human Resources to Dr. Douglas on April 12, 1983. The proposed rules basically restate the statutory requirements but do not indicate any sources of funding for the fulfillment of guardianship responsibilities nor do they give to the guardians any authority to allocate existing resources to the care and treatment of the wards of guardians.

18. I do not have a position as to whether Thomas S. has a right to treatment on the basis of the state or federal constitution or on the basis of state

statutes. Thomas S.'s guardian ad litem is filling this role.

19. I do have a position as to whether the Consent Judgment is adequate to protect the interests of Thomas S. My position is that the Consent Judgment does not protect the interests of Thomas as I perceive those interests. This is because there is no assurance of continued funding of the contract which is embodied in the Consent Judgment. It is my understanding and belief that Tom will require care and treatment for a period of time beyond the expiration of this contract.

[D-284]

20. Furthermore, the contract as it is now written has not been approved by me as guardian, nor does it provide any way for me as guardian to monitor the care and treatment of Thomas as I am obliged by statute to do.

21. Proposed revisions of that

contract have been prepared by me and by my attorney and have been submitted to Gaston-Lincoln Mental Health Area Program and to PUSH Incorporated. Thus far no revised contract has been concluded by me.

22. By virtue of N.C.G.S. Section 35-1.34 I am entitled to determine who shall be the custodian of Thomas S. and where he shall reside. I am empowered to give consent to his treatment. Pending conclusion of a treatment contract and plan which I believe to protect the best interests of Thomas S., no such consent or approval has been given by me.

23. Unresolved factual issues in this case, form my perspective, presently include:

a. Which is the designated agency whose duties are specified in G.S. Section 35-1.32 as a correspondent or partner to the guardian in the fulfillment of the guardian's

responsibilities.

b. Where shall the guardian get resources to fulfill his future responsibilities to Thomas S.?

c. If no resources are available to the guardian, is he still responsible to provide for the treatment of Thomas S.?

d. If no resources are available to the guardian, who could be expected to serve as guardian?

[D-285]

Further your affiant saith not.

R. Allen Childress

Sworn to and subscribed before
me this 1st day of June, 1983.

Donna C. Patton

My Commission Expires: Nov. 3, 1985

. . . .

[D-289]

STATE OF NORTH CAROLINA FILE# 81 SP 392

COUNTY OF BURKE FILM# _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

In The Matter of

Thomas Shedd
c/o Gerald's Lazy Acres
Morganton, N.C.
Name and address of Respondent

ORDER DESIGNATING AGENCY
TO PERFORM MULTIDISCIPLINARY
EVALUATION

[x] On the request of

Edward Connette, 195 W. Main Ave., Gastonia
(Name and address) (Guardian Ad Litem)

by an order requiring a multidisciplinary evaluation to be performed on the respondent named above;

[ ] The undersigned Clerk, being of the opinion that a multidisciplinary evaluation should be performed on the respondent, on its own motion issues this order requiring the agency designated below to prepare the multidisciplinary evaluation;

It is therefore, ORDERED:

1. That N.C. Memorial Hospital, Psychiatric Unit, Chapel Hill, North Carolina

(Name of Agency - Address)

be designated to prepare, cause to be prepared, or assemble a current multidisciplinary evaluation of the respondent named above.

2. That the agency designated above shall file the report of the evaluation with the Clerk, and send copies thereof to the petitioner and the respondent in this proceeding, not later than 30 days after the agency receives this Order.

The name and address of the petitioner is a follows:

Gaston County Department of Social Services
c/o Cathy Stevens, Attorney
Gastonia, N.C.

This the 12th day of June, 1981.

Assistant/Clerk of Superior Court

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Supreme Court Bar, and that on the 13 day of June, 1986, I have served a copy of the SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI by placing the same in the United States Mail, first class postage prepaid, addressed to the following:

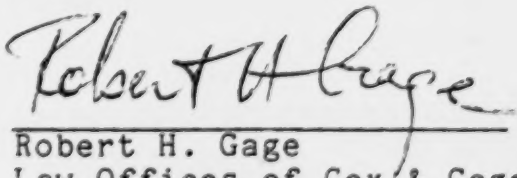
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EDITOR'S NOTE

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ORIGINAL

Supreme Court, U.S.
FILED
JUN 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

R. ALLEN CHILDRESS,

PETITIONER,

v.

THOMAS S., appt't guardian ad litem,
JOYCE BROOKS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. IS PETITIONER, WHO WAS APPOINTED IN HIS OFFICIAL CAPACITY AS A STATE EMPLOYEE TO SERVE AS RESPONDENT'S GUARDIAN, A PROPER PARTY IN THIS §1983 ACTION AFTER ADMITTING IN HIS ANSWER THAT HE ACTED UNDER COLOR OF STATE LAW?

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NO. 85-1895

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

R ALLEN CHILDRESS,

PETITIONER,

v.

THOMAS S., appt't guardian ad litem
JOYCE BROOKS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondent Thomas S. respectfully requests this Court to deny the Petition for a Writ of Certiorari seeking review of the Fourth Circuit Court of Appeals' judgment in this case, as reported at 781 F.2d 367.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The decision of the Court of Appeals, reported at 781 F.2d 367, Petition, Appendix A-1, contains a thorough statement of facts accurately gleaned by the court from the voluminous record in this case. Respondent's summary of facts in his Brief in Opposition to a Petition for Writ of Certiorari filed by another party, Philip J. Kirk, under docket no. 85-1590 also contains a more succinct but entirely consistent statement of facts. Respondent adopts and refers to the statement of facts of the Court of Appeals, Petition, Appendix A-1.

B. HISTORY OF THE CASE

Petitioner Childress' Petition follows a related petition filed by his co-defendant, Philip J. Kirk, under docket no. 85-1590. That Petition for a Writ of Certiorari was DENIED in an order dated May 19, 1986. ____ U.S. ____.

On July 7, 1982, Thomas S. brought suit against Sarah Morrow, then Secretary of the North Carolina Department of Human Resources (DHR); against DHR employee Allen Childress, in his offical capacity as Thomas' guardian; and against the directors of two local agencies, the Gaston County Department of Social Services and the Gaston-Lincoln Area Mental Health Program.

The complaint alleged that defendants had denied Thomas' substantive due process rights under the Fourteenth Amendment for failure to provide minimally adequate treatment, that Thomas'

hospitalization imposed a degree of restraint on his liberty inconsistent with professional judgment concerning his treatment needs, and that improper treatment violated various state law provisions. An amended complaint later alleged that defendants had deprived Thomas of substantive liberty interests created by state law. Thomas requested injunctive relief requiring defendants to place him in an appropriate treatment setting and to provide other treatment recommended by professionals who had examined and worked with him. Unlike the plaintiff in Youngberg v. Romeo, 457 U.S. 307 (1982), Thomas sought no damages.

On December 7, 1984, the district court entered a final judgment requiring Kirk and Childress to develop a treatment plan for Thomas. Thomas S. v. Morrow, 601 F.Supp. 1055, (WDNC 1984). It further directed these defendants to furnish Thomas with treatment recommended by the qualified professionals who had evaluated his needs, including suitable residential placement and non-residential services. Id.

The defendants appealed, and the district court judgment was unanimously affirmed on January 9, 1986, in a decision reported at 781 F.2d 367 (Petition, App., A). Thereafter, defendant Kirk's petition for rehearing and his motion for stay of mandate were denied by the Court of Appeals. Kirk's Petition for Writ of Certiorari was denied under docket no. 85-1590, ____ U.S. ____.

Kirk's co-defendant, Allen Childress, has now filed a Petition for Writ of Certiorari, and Respondent submits this brief in opposition.

ARGUMENT

THE COURT HAD AUTHORITY TO ENFORCE PLAINTIFF'S CONSTITUTIONAL RIGHTS AGAINST THE PETITIONER, AND THE PETITIONER IS A NECESSARY PARTY FOR AFFORDING COMPLETE RELIEF.

Thomas' state-appointed guardian, defendant Allen Childress (the Petitioner), does not argue that DHR has provided Thomas with the minimally adequate treatment prescribed for him, nor does the Petitioner complain that the relief ordered by the court was unnecessary or contrary to the Petitioner's plans for Thomas. Basically, the Petitioner objects to being made a party defendant on technical grounds. For the reasons summarized below, however, his Petition has no merit.

A. The petitioner admitted as a fact that he acted under color of state law with respect to respondent's claim under 42 U.S.C. §1983; therefore, the court had subject matter jurisdiction under 28 U.S.C. §1343(3).

The Petitioner seeks to challenge the court's subject matter jurisdiction by claiming that he has not acted under color of state law within the meaning of 42 U.S.C. §1983. He seeks to escape his judicial admission in paragraph 36 of the Amended Answer -- that he had acted under color of state law -- by reference to various cases discussing requirements for jurisdictional state action that are inapplicable to the facts of this case. Respondent's Appendix A, ¶36.

The Petitioner has confused the requirements of subject matter jurisdiction under 28 U.S.C. §1343 with the statement of a colorable claim for relief under the remedial statute, 42 U.S.C.

§1983. Clearly, 42 U.S.C. §1983 provides a substantive right of action and is not jurisdictional. Hagans v. Lavine, 415 U.S. 528, 535 (1974). Actions under §1983 may be entertained in state courts as well as federal. Maine v. Thibotot, 448 U.S. 1 (1980).

Whether a party has acted under color of state law for purposes of stating a claim under §1983 is a question of fact that must be determined in each case. Polk County v. Dodson, 454 U.S. 312 (1981). If the Petitioner here wished to contest that fact, he should have denied the allegations and moved to dismiss the §1983 claim under Rule 12(b)(6).

With the Petitioner's admission that he acted under color of state law, it is clear that respondent stated a colorable claim against him under §1983. Respondent alleged that the Petitioner wrongfully kept Thomas institutionalized at Broughton Hospital contrary to defendant's professional judgments and thereby restricted his liberty. Certainly that stated a claim under §1983. Youngberg v. Romeo, supra. Having stated a colorable claim against the petitioner under §1983, the respondent invoked the subject matter jurisdiction under 28 U.S.C. §1343(3).

B. The petitioner is a necessary party for complete relief because he has statutory control over Thomas' liberty.

Rule 19 of the F.R.C.P. requires the joinder of every person if in his absence complete relief cannot be accorded. Because Petitioner has the statutory power to make virtually all decisions affecting Thomas' liberty -- including his residence

and participation in treatment -- he is a necessary party. The fact that the Petitioner appears to favor respondent's substantive claims here does not negate the possibility that he may not always do so, nor does it negate the fact that he placed and maintained Thomas in Broughton Hospital inappropriately and in violation of his liberty interests.

Respondent recognizes the lack of resources afforded to the Petitioner by defendant Kirk and the state statutes. Nevertheless, if Kirk were left as the only party defendant, he might escape compliance with the court's orders if the petitioner refused to make Thomas available for appropriate residential placement and treatment. On the other hand, if the petitioner remains as a defendant and obeys his responsibility to Thomas, he has lost nothing. He is not subject to liability for damages (and Thomas seeks none), and defendant Kirk is paying for his separate attorney. Ironically, the petitioner's true independence from defendant Kirk will probably be strengthened by his remaining subject to the court's orders. His strong advocacy for Thomas may otherwise be more suspect in the eyes of his employer (Kirk). In short, there is no legal or equitable reason for removing the Petitioner from this action.

C. The court has jurisdiction over the Petitioner under Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) and other authorities cited by Petitioner

Petitioner claims the the Fourth Circuit misinterpreted Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) and other authori-

ties in finding jurisdiction over him under 42 U.S.C. §1983. As argued earlier, Petitioner had admitted in his answer to Respondent's complaint that his actions were under color of state law, so that the court did not need to consider the issue further. Nevertheless, its analysis of Lugar and other authorities was correct, and Petitioner's argument to the contrary is erroneous.

In the decision below, the court of appeals correctly identified the standard established by this Court in Lugar:

> In Lugar v. Edmondson Oil Co., the Court explained that "conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State." The Court then outlined a two-part test for determining whether a defendant's acts may be attributed to the state. The first component of the test, the "under color of state law" requirement of §1983, is satisfied if the deprivation is "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible."
>
> . . . .
>
> The second component of the Lugar test of a cause of action under §1983 inquires whether the defendant "may fairly be said to be a state actor."
>
> 781 F.2d at 377 [citations omitted]

The court of appeals applied the Lugar standard by recognizing that the Petitioner's guardianship authority over Thomas S. is a "right or privilege created by the State," that the Petitioner's state-created authority is extremely broad, and that the Petitioner "has acted together with or has obtained significant

aid from the state." 781 F.2d at 377-378. The Petitioner was appointed to serve as guardian in his role as a state employee, and the court of appeals observed that he was absolved from personal liability for providing funds or resources for treatment. Id. The Petitioner's argument that the court of appeals improperly relied on Lugar is clearly wrong.

Similarly, Petitioner's reliance on Polk County v. Dodson, supra. is misplaced. In Dodson, a court-appointed attorney and other defendants denied that they were acting under color of state law. Further, the state-appointed attorney demonstrated an exceptional independence from the state grounded in the fact that the decision complained of (withdrawing as counsel) appeared to be compelled by the ABA Standards of Criminal Justice. Polk County v. Dodson, 454 U.S. at 322. Another distinction from Dodson is that the state-appointed attorney's insulation from the state's influence was guaranteed by the Sixth Amendment. Id. Here, the Petitioner claims that his "independence" is derived from the duty of loyalty to Thomas imposed by N.C.G.S. §35-1.6. However, this statute does not provide the Petitioner with any financial resources, independent of the state defendant Kirk, to place Thomas outside of Broughton Hospital and to give him the treatment that the Petitioner knew was needed. Thus, the Petitioner essentially acquiesced in the deprivations of Thomas' liberty required by the defaults of defendant Kirk.

CONCLUSION

Thomas is in critical need of the treatment ordered under the judgment. According to a letter to the district court from Petitioner's counsel:

> If appropriate treatment is not provided to Tom he will likely:
>
> a. Become a chronic inmate of Broughton Hospital; or
> b. Be warehoused and medicated in a rest-home for the indefinite future; or
> c. Get in trouble with the law; or
> d. Live or perish as a "street person."

Thomas has shown that he is constitutionally entitled to receive the treatment prescribed for him. The petition for certiorari should therefore be DENIED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil No. 82-418-M

THOMAS S., by his next friend, PAUL CALDWELL,

Plaintiff,

vs.

SARAH T. MORROW, Secretary, N.C. Department of Human Resources; ALLEN CHILDRESS, in his official capacity as guardian for the plaintiff; BENJAMIN CARPENTER, Director, Gaston County Department of Social Services; JAMES MELTON, Director, Gaston-Lincoln Area Mental Health Program; HARLEY B. GASTON, JR., DAVID BEAM, DAVID HOLLIFIELD, JAMES FORRESTER, DEAN CARPENTER, ROBERT HEAVNER, and PORTER McATEER, in their official capacity as Gaston County Commissioners,

Defendants.

AMENDED COMPLAINT

PRELIMINARY STATEMENT

1. Thomas S. is a nineteen year-old Broughton Hospital patient who cannot return home to Gaston County because there are no appropriate group homes or after-care facilities where he can receive the treatment he needs. He can communicate and possesses many self-care skills, but he is presently incapable of living independently because he is emotionally handicapped and borderline mentally retarded. Examinations by psychologists, vocational experts, social

movement, and freedom from restraint than is appropriate or indicated by professionals who have examined him. His continued hospitalization bears no rational relation to his initial placement there or to the treatment and other services for which a guardian was appointed to provide pursuant to N.C.G.S.§35-1.6 et seq.

35. Upon information and belief, there are other Gaston County residents whose treatment needs are similar to those of Thomas. Upon information and belief, the number of such other residents is sufficient to warrant the development of group treatment facilities needed by Thomas in Gaston County. The development of a small, community-based and homelike group treatment program in Thomas' home community will serve his treatment needs and will avoid the emotionally damaging instability and stigma that would result from placing him outside Gaston County in an existing facility in another county or state.

36. The defendants' conduct toward the plaintiff at all times relevant herein occurred under color of state law within the meaning of 42 U.S.C. §1983.

FIRST CLAIM FOR RELIEF

37. The defendants have failed to provide Thomas with minimally adequate treatment in a setting that offers the least intrusion on his personal liberty, freedom of movement, and freedom from restraint.

38. The defendants have undertaken to have Thomas declared incompetent and to have a state official

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

Civil No. C-C-82-0418-M

THOMAS S., by his next friend, PAUL CALDWELL, Plaintiff, v. SARAH T. MORROW, Secretary, N. C. Department of Human Resources; ALLEN CHILDRESS, in his official capacity as guardian for the plaintiff; BENJAMIN CARPENTER, Director, Gaston County Department of Social Services; JAMES MELTON, Director, Gaston-Lincoln Area Mental Health Program, Defendants.	AMENDED ANSWER OF DEFENDANTS MORROW AND CHILDRESS

Defendants Sarah T. Morrow and Allen Childress, answering the amended complaint in their official capacities, allege and say:

FIRST DEFENSE

The portions of the amended complaint pertaining to Defendants Morrow and Childress should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for the reason that the allegations pertaining to them as contained in such complaint totally fail to state a claim upon which relief can be granted.

33. Defendants deny the allegations contained in Paragraph 33 of the amended complaint.

34. Defendants deny the allegations contained in Paragrah 34 of the amended complaint.

35. Defendants lack information from which to form an opinion as to the truth or falsity of the allegations contained in Paragraph 35 of the amended complaint, and the same are therefore denied.

36. Defendants admit the allegations contained in Paragraph 36 of the amended complaint.

37. Defendants deny the allegations contained in Paragraph 37 of the amended complaint.

38. Defendants deny the allegations contained in Paragraph 38 of the amended complaint.

39. Defendants deny the allegations contained in Paragraph 39 of the amended complaint.

40. Defendants deny the allegations contained in Paragraph 40 of the amended complaint.

41. Defendants deny the allegations contained in Paragraph 41 of the amended complaint.

42. Defendants deny the allegations contained in Paragraph 42 of the amended complaint.

43. Defendants admit the allegations contained in Paragraph 43 of the amended complaint.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Supreme Court Bar, and that on the 18th day of June, 1986, I have served a copy fo the RESPONSE TO PETITION FOR CERTIORARI by placing the same in the United States Mail, first class postage prepaid, addressed to the following:

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